# 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**

**Plaintiff**

**-and-**

**IJK LIMITED**

**Respondent**

## RULING (REDACTED)

**Date of Hearing:** **15 December 2020**
**Date of Judgment:** **26 January 2021**

**Appearances:** **Mr. Jeffrey Elkinson, Conyers Dill & Pearman, for the Minister of Finance**

**Matthew Watson, Cox Hallett Wilkinson Limited, for the Respondent**

**RULING of Mussenden J**

## Introduction

1. By a Summons dated 20 August 2020, the Respondent IJK Limited ("the Respondent" or "the Company") seek the grant of a right of review of an ex parte Production Order dated 4 March 2020 ("the 2020 Production Order") issued by the Court pursuant to the Tax Information Exchange Agreement between the Government of the Republic of India and Bermuda ("the TIEA"). The Respondent also seeks disclosure of the documents filed with the Court by the Minister of Finance ("the Minister") on his ex parte application to obtain the 2020 Production Order.

2. The Respondent also applies to set aside the 2020 Production Order although this would be at a subsequent hearing on the basis that the Court will grant a right of review and the Respondent submitting other evidence and submissions before the Court should disclosure be ordered.

## The 2020 Production Order

3. The Minister received a request for information from the Government of India ("the 2020 Request"). By an ex parte Production Order dated 4 March 2020, the Court, pursuant to section 5(2) of the International Cooperation (Tax Information Exchange Agreements Act 2005 ("the 2005 Act"), 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.

**Relevant provisions to the 2005 Act**

4. The Chief Justice set out the relevant provisions of the Act in *Ministry of Finance v DEF Ltd* [2019] SC (Bda) 47 Civ. 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.

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."

**Test to be applied in considering whether it should grant the right of review under section 5(6B).**

5. In *Ministry of Finance v DEF* the Chief Justice found 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. He stated that this test is consistent with the test applied in relation to applications for judicial review. I also accept that this is the correct test to be applied.

6. Counsel for the Respondent cited *Ministry of Finance v DEF* and accepted that the onus is on it to establish an arguable ground for review.

7. In *Ministry of Finance v DEF* the Chief Justice stated as follows:

> *"… The current scheme of section 5(6A) and (6B) is based on the premise that the Court has to decide whether to grant the right of review without recourse to the documents which were made available to the Court on the ex parte application for the Production Order. In particular the Court is looking for grounds for declining assistance set out in section 4(2). …"*

8. Mr. Watson submitted that the possible grounds for declining a request for assistance are not limited to section 4(2) of the 2005 Act. He submitted that Parliament could have specified or limited the grounds to section 4(2), but did not do so; therefore there are other grounds that can be relied upon to decline a request.

9. First, Mr. Watson submits that the Minister has a discretion under the 2005 Act section 4(1) whether to grant a production order as follows:

> "4. Grounds for declining a request for assistance
> (1) The Minister may decline a request for assistance where there is provision in the applicable agreement for him to do so."

10. The TIEA, Article 7 entitled "Possibility of Declining a Request for Information" sets out the provisions for the Minister to decline a request:

> *"1. The competent authority of the requested Party may decline to assist:*
> *(a) where the request is not made in conformity with this Agreement; or*
> *(b) where the requesting Party has not pursued all means available in its own territory to obtain the information, except where recourse to such means would give rise to disproportionate difficulty; or*
> *(c) where disclosure of the information would be contrary to public policy (ordre public) of the requested Party."*

11. I find that the language and intent of these provisions are clear and I accept that the Minister may decline a request to assist under the 2005 Act section 4(1) as read with the TIEA.

12. Second, Mr. Watson submits that the Court has a discretion under section 5(2) of the 2005 Act whether to grant a production order and further that the case law supports that a right of review exists in respect of the Court's discretion, for example, if there was material non-disclosure on the ex parte application. He relies on the Court of Appeal case of *Minister of Finance v AP* [2016] CA (Bda) 29 Civ, which I agree is binding on this Court, where Bell J stated:

> "*At the end of the day, the point is a relatively narrow one – whether the common law safeguards applicable to ex parte applications generally are applicable to ex parte applications for relief under the 2005 Act. For the reasons above, I believe they are*".

13. Third, Mr. Watson submits that the 2005 Act is unlikely to have prevented the Court's ability to control its own process on for example, abuse of process, estoppel, case management or any other grounds that may arise as a matter of common law, equity or the Court's inherent jurisdiction. Mr. Elkinson submits that the Respondent attacks the statutory process as if it was a commercial case. He submits that the statutory scheme cannot be treated like a commercial case, that it is not a judicial review of the Minister's

decision and that the 2005 Act is a statutory scheme for which remedies such as abuse of process do not apply. However, I accept that the Court always has the ability to control its own process.

14. Additionally, Mr. Watson submits that a review can be properly based on (a) a challenge to the Minister's decision to apply for a production order, for example, whether the Minister acted unreasonably, irrationally, failed to take into account a relevant consideration, took into account an irrelevant consideration or made a material mistake of fact; and (b) a challenge to the Court's decision to grant a production order for example, on the basis that there was material non-disclosure by the Minister on the ex parte application or whether the Minister's application for a production order was an abuse of process.

15. Mr. Elkinson submits that the Respondent wants disclosure of the documents relied upon in the ex parte application to seek grounds for review but this was no longer available as a ground for a right of review under section 5(6B) of the 2005 Act. This was a result of the fact that the Respondent had not seen the documents relied on by the Minister in the application for the 2020 Production Order. Therefore, their submissions amounted to speculation and conjecture. He relied on *Ministry of Finance v DEF Limited*, in particular (a) the Chief Justice's review of the historical position of the Act and (b) the finding about section 5(6A) and (6B):

> *"26. The complaint that without knowing what information has or has not been provided to the Court by the Minister's application that the Respondents are unable to ascertain potential grounds for seeking to set aside the Order, made in the first and last sentences of paragraph 4 of the Jibreus Affirmation, would have been a perfectly justifiable and sustainable complaint prior to the latest amendments to section 5(6A) and (6B). However, in light of the current wording of Section 5(6A) and (6B) this ground by itself would not be sufficient for the Court to grant the right of review.*

16. In general, I accept that arguable grounds 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 Act, (b) in respect of the common law safeguards applicable to ex parte applications in respect of non-disclosure in ex parte applications and (c) the Court's ability to control its own process.

**Application of the test to the alleged factual grounds for review**

17. The factual grounds relied upon for seeking the right of review under section 5(6B) are set out in the Affidavit of the Interim General Counsel ("General Counsel") sworn 13 April 2020 as follows:
    a. The 2020 Production Order had been procured in disregard of the Minister's duty of full and frank disclosure of material facts known to the Minister.
    b. The 2020 Production Order was in breach of the provisions of the TIEA entered into between the two countries on 7 October 2010.
    c. The Respondent (and another Bermuda company within the group of companies) had been served with four previous production orders issued by the Supreme Court of Bermuda over the years from 2012 – 2019 – all made at the request of the Government of India;
        i. Three of the previous production orders were sought in connection with the tax investigations of the same two tax payers, ("the Two Taxpayers");
        ii. The second production order was challenged on the basis of a failure to make full and frank disclosure, the Supreme Court upheld the challenge and the Minister of Finance appealed the judge's decision but was unsuccessful on appeal;
        iii. The third production order (against the Respondent under an earlier name) was also challenged on the basis of the Minister's failure to make full and frank disclosure to the Court. The Minister did not contest these allegations and a consent order was entered on 12 October 2018 setting it aside.
        iv. The fourth production order ("the 2019 Production Order") did not name the tax payer who was the subject of the investigation in India. The

Respondent objected to the issuance of the fourth production order on the basis that it was fundamentally flawed in that respect as well as being oppressive. The fourth production order was abandoned by the Minister.

d. It is not clear to the Respondent whether the 2020 Production Order is in order to obtain information thought to be relevant to the Two Taxpayers' investigation or whether the Indian Tax Authorities ("ITA") require the information in connection with a tax investigation of the Respondent itself.

e. The Respondent has been in contact with the ITA and has provided all the information and documents requested by the ITA on a voluntary basis.

f. There were no outstanding requests for information at the time of the issuance of the 2020 Production Order.

g. In light of the above factors, there was no need for the ITA to seek to compel the Respondent to produce documents in Bermuda by a Supreme Court Order.

h. If the 2020 Production Order was issued in connection with an investigation of the Respondent, then the information and documents could have been obtained in the course of the ordinary administrative practices of the ITA, as was the case with other documents provided by the Respondent when requested.

i. The ITA have already been provided with a wealth of information for the periods in question, akin to what is now requested.

j. The status of tax assessments for the financial years 2013-2016 are that the assessments for the financial years 2013-14 and 2014-15 are pending at the Income Tax Appellate Tribunal (ITAT) and for 2015-16 a Commission of Income tax appeal is to be filed.

k. Pursuant to the TIEA, a request must contain a statement that the request is in conformity with the administrative practices of the requesting party. If there was any such statement in the 2020 Request that led to the issuance of the 2020 Production Order then it would have been incorrect in light of the previous voluntary provision of information and documents on request from the ITA.

18. Counsel for the Respondent submits that as the Minister has not filed any evidence in response then the General Counsel's affidavit evidence is unchallenged and ought to be

accepted. On that basis, the Respondent submits that that they have met the test for a right of review having established an arguable case on various grounds.

19. Mr. Elkinson submitted that the Respondent has raised no substantive facts upon which the Court can consider that it is appropriate to grant a right of review and that the application should be refused. He complained that the Respondent's use of language such as *"it is not clear", "likewise unclear"* and "*believes it has been procured*" which was speculative and conjecture and would fail to meet the required test.

**Ground 1**

20. The Respondent submits that the 2020 Production Order should not have been heard ex parte. Mr. Watson submits that ex parte relief is an exceptional remedy, as it deprives fundamental natural justice of an opportunity to be heard and that it is all the more exceptional given the Minister is seeking relief of a final nature in the form of a production order with a penal notice. He further submits that proper justification must exist for an ex parte application where the person/entity may not be entitled to see the documents filed on the ex parte application until a review has been granted. He claims that this affords a significant tactical advantage to the Minister against the person/entity against whom the production order is sought.

21. The Respondent submits that this case is a clear case where ex parte relief without notice was plainly inappropriate against the backdrop of the history of breaches of full and frank disclosure by the Minister as found by the Supreme Court and the Court of Appeal, multiple abandoned production orders subsequently and in light of the discontinuance of the identical 2019 Production Order and the tactical advantage the Minister would secure upon obtaining an ex parte order. He relies on the advice of Lord Hoffman of the Judicial Committee of the Privy Council in *National Commercial Bank Jamaica Ltd v Olint Corp Ltd* [2009] 1 WLR 1405 where he stated:

> *"First, there appears to have been no reason why the application for an injunction should have been made ex parte, or at any rate, without some notice to the bank. Although the matter is in the end one for the discretion of the judge, audi alterem partem is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a Mareva or Anton Piller order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. These two alternative conditions are reflected in rule 17.4(4) of the Supreme Court of Jamaica Civil Procedure Rules 2002. Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none.'*
>
> *...*
>
> *These cases appear to show a disrespect of rule 17.4(4) for which no justification is offered. If the rule is not generally enforced, plaintiffs will be encouraged to make a tactical use of the legal process which should not be allowed."*

22. In my view, the Minister was in possession of the documents arising out of the history of requests for Production Orders in respect of the Respondent, including the documents in relation to the 2019 Production Order which would have consisted of the request, the affidavit of the General Counsel in response to it, the Minister's own reasons for discontinuing it and the fact that the Notice of Discontinuance was filed in Court and served on the Respondent. Once the 2020 Request was received then the Minster would have been in a position to compare the 2019 and 2020 Requests to see the differences. The Respondent submits that the information and documents sought by the 2019 and 2020 Production Orders are identical save that references to "*taxpayer*" in Categories 14-19 have been replaced with "*the Company*". On that basis, it seems reasonable that the Minister, in reality his delegates, should have noticed the same identical nature of the two requests and the accompanying background thus raising a cautionary flag. Consequently, the Minister

would have had a basis to not make an ex parte application but instead make an inter partes application. At the very least, he could have put the Respondent on notice that an application for a production order on the essentially the same terms as had been discontinued was going to be filed.

23. This leads to the consideration of whether an inter partes hearing would have had the effect of the Minister's application for the 2020 Production Order being denied. First, the Respondent would have been afforded the fundamental natural justice of an opportunity to be heard. Second, the Respondent in any inter partes hearing in respect of the 2020 Request, would have been able to lay out the history of the matter ensuring that the Court was fully apprised of the background and the information potentially available to it. Thereafter, the Court could consider all the submissions, including the information that the Respondent had not seen, to make its decision whether to grant the 2020 Production Order.

24. In my view, the failure to have an inter partes hearing does not engage the grounds of section 4(1) and 4(2) to decline the request for information based on their specific provisions and therefore does not provide arguable grounds for a review. I am also of the view that this complaint does not engage abuse of process and therefore does not raise an arguable ground for a right of review on that basis.

25. However, I have considered the common law safeguards in light of the judgment of Bell JA in *Minister of Finance v AP* and the advice of Lord Hoffman in *National Commercial Bank Jamaica Ltd v Olint Corp Ltd.* In my view, in the present case in light of the history of the Production Orders as set out, an inter partes hearing would have been preferable to an ex parte application so that all the issues could have been ventilated and allowed the Judge to exercise his discretion whether to grant or decline the 2020 Production Order. In light of the above reasons, I am satisfied that this is an arguable ground for a right of review.

**Ground 2**

26. The Respondent submit that there was a material non-disclosure of the 2019 Production Order. Counsel submits that the 2020 Production Order stated the following in the recitals

"*The Judge read the evidence in support of the application and dealt with the matter on the papers/heard submissions and was satisfied the conditions of the Agreement relating to the request had been fulfilled*". He further submits that (a) the 2020 Production Order does not identify with any specificity what evidence was placed before the Court; (b) that if the 2019 production Order was placed before the Court then a reference to it would have been in the recitals to the 2020 Production Order; and (c) that there is an arguable case that the Minister breached his duty of full and frank disclosure in failing to disclose or explain the 2019 Production Order including the Respondent's affidavit in response to it, the Minister's reasons for discontinuance and the Respondent's unpaid costs arising from it. Finally, the Minister's *volte face* called for an explanation to the Court as to the Minister's radical change in position in less than a year, so the Court would be satisfied that the Minister made a rational and reasonable decision to apply for the 2020 Production Order in identical terms enabling the Court to exercise its discretion accordingly.

27. In *Ministry of Finance v DEF Limited* the Chief Justice stated:

> *"The current scheme of section 5(6A) and (6B) is based on the premise that the Court has to decide whether to grant the right of review without recourse to the documents which were made available to the court on the on the ex parte application for the Production Order."*

28. In my view, there is some considerable difficulty in the Respondent submitting that there was a material non-disclosure of the 2019 Production Order when the Respondent does not know what information was placed before the Minister. It is also extremely speculative and a stretch to assert that if the 2019 Production Order was placed before the Minister then that fact would have been in the recitals of the 2020 Production Order.

29. In my view, as there is no factual evidence to support the assertion that there was a material non-disclosure of the 2019 Production Order, at this stage, then this ground fails to establish an arguable ground for a right of review.

30. On a related point, in respect of the Respondent's present request for disclosure of the documents relied upon in the ex parte hearing for the 2019 Production Order, both Counsel agreed that the request was not in the Summons. However, Mr. Watson submitted that on any review of the documents relied upon for the 2020 Production Order, it may be important to be able to review the documents relied upon for both the 2019 Production Order and the 2020 Production Order. In my view, the 2019 Production Order is not a part of this application and so the Court is unable to order any disclosure of documents in relation to that 2019 Production Order.

**Ground 3**

31. The Respondent submits that there was material non-disclosure as to non-compliance with Article 5, paragraph 6(h) of the TIEA which states as follows:

> *"6. The competent authority of the requesting Party shall provide the following information to the competent authority of the requested Party when making a request for information under the Agreement to demonstrate the relevance of the information to the request:*
>
> *(a) the identity of the person under examination or investigation;*
>
> *(b) the period for which information is requested;*
>
> *(c) the nature of the information requested and the form in which the requesting Party would prefer to receive it;*
>
> *(d) the tax purpose for which the information is sought;*
>
> *(e) grounds for believing that the information requested is present in the requested Party or is in the possession or control of a person within the jurisdiction of the requested Party;*
>
> *(f) to the extent known, the name and address of any person believed to be in possession or control of the requested information;*
>
> *(g) a statement that the request is in conformity with the laws and administrative practices of the requesting Party, that if the requested information was within the jurisdiction of the requesting Party then the*

> *competent authority of the requesting Party would be able to obtain the information under the laws of the requesting Party or in the normal course of administrative practice and that it is in conformity with this Agreement;*
> *(h) a statement that the requesting Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties."*

32. Mr. Watson submits that the Minister has a discretion to decline a request where the mandatory requirement of Article 5 paragraph 6(h) is not complied with. He argues that (a) a request should never have been made by the Government of India as it was unable to satisfy the mandatory requirement in Article 5 paragraph 6(h); (b) On the basis that the requesting State made such a statement in order for the Production Order to be issued, then such statement had to be false because of the unchallenged evidence of the General Counsel where he states:

> *"7. In the latter regard the Company has been in communication with the Indian Tax Authorities and has provided all information and documents requested by the Indian Tax Authorities on a voluntary basis. There was no outstanding requests for information at the time of the issuance of the 2020 Production Order. There was, therefore, in the Company's view no need for the Indian Tax Authorities to seek to compel the Company to produce documents in Bermuda by a Supreme Court order.*
>
> *8. If the 2020 PO was in connection with an investigation of the Company, it is clear to the Company that the information and documents could have been obtained in the course of the ordinary administrative practices of the Indian Tax Authorities; as was the case with other documents provided by the Company when requested directly."*

33. Mr. Watson submits that a false statement was made which in turn would be fatal to the validity of the 2020 Production Order for several reasons. He submits that such a material error of fact constitutes a breach of the Minister's duty of full and frank disclosure to the

Court on the ex parte basis. He submits that such an error of fact would have caused the judge to err in recording in the recital to the 2020 Production Order that "*the Court was satisfied the conditions of the Agreement relating to the Request had been fulfilled*".

34. Mr. Watson relies on the case of *Minister of Finance v Ap* where Hellman J stated:

> *"Where an application is made to the Court pursuant to a letter of request, the applicant's duty of full and frank disclosure includes all material matters which are known or ought to be known by the Requesting Party. It is no answer to an allegation of non-disclosure that the applicant did not disclose such matters to the Court because the requesting party did not disclose them to the applicant."*

35. Mr. Watson also relies on the Court of Appeal judgment in that case wherein it endorsed the reasoning of Hellman J:

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

> *material, it is hard to see what alternative the judge could have had but to set aside the ex parte order.*
>
> *Similarly, the fourth ground can be dealt with shortly, insofar as it too has been dealt with in paragraph 20 above. To my mind, the suggestion that the Minister may have been entitled to rely on the accurate information given by the Requesting Government does not mean that that is an end to the matter. As stated before, the question is not whose fault it was that inaccurate or misleading information was presented to eh judge: it is simply that such was the case."*

36. I accept the unchallenged evidence of the General Counsel that the Respondent had been in communication with the ITA, that it provided all the information requested on a voluntary basis and there were no outstanding requests. There appears to be a history of involvement directly between the Respondent and the ITA. The General Counsel in his affidavit states that he has been "*informed by the Finance Director/Global Tax/Global Payroll that the Indian Tax Authorities have already been provided with a wealth of information for the periods in question, akin to that now requested, in the context of the current and long-running dispute between the Company and those authorities.*"

37. In response, Mr. Elkinson for the Minister submits that there was no need for the Minister to file affidavit evidence and that any factual basis must be something substantial. He submitted that sometimes Governments want to check information from another source and that it was not for the Minister to go back to the Requesting State to make inquiries. He also states that the Respondent in its complaints uses conjectural terms such as "*we think*", "*possible*" and "*it may be*", although I do not note such terms in the General Counsel's affidavit. Additionally, he submits that the Chief Justice considered the issue where a subject of a Production Order had provided information previously to the Requesting State in *Ministry of Finance v DEF Limited*:

> *"27. The only factual complaint made is that, "the Entities have already given extensive disclosure to the Swedish Authorities of their financial information. The*

*disclosure sought in the Production Order seems to include areas already covered by earlier disclosures". No particulars have been provided in relation to any relevant "extensive disclosure" which it is alleged has already been made to the Swedish authorities, Based upon this unparticularised assertion it is said that the disclosures sought in the Production Order "seems" to include areas already covered by earlier disclosure. This complaint is made on a tentative basis. Further, no particulars [have been] given in relation to the relevant disclosure already made or to which part of the information ordered to be produced this complaint applies to. In light of the total absence of any particularised facts the Court is wholly unable to say whether this complaint gives rise to an arguable ground for review.*

*28. The Respondents also complain that the alleged complaint that the Order seems to include areas already covered by the earlier disclosure "causes us to be concerned as to whether the Minister has failed to disclose material information to the Court about past information and documents provided by the Entities". This complaint is premised upon the earlier complaint – the allegation that the Production Order seems to include areas already covered by earlier disclosure – which I have already found cannot be relied as giving rise to an arguable ground. Further, it is put purely on a conjectural basis. I do not consider that this ground advances the Respondent's application for the grant of right of review."*

38. Mr. Elkinson also submits that the complaint that the Respondent had already given disclosure to the ITA, if in fact that were to be the case, there is nothing which offends the 2005 Act by requesting this information pursuant to the TIEA.

39. I note that in *Minister of Finance v AAA Group Limited* [2016] SC (Bda) 75 Civ Hellman J stated:

*"The Minister or those acting for him may wish to ensure that the requesting State has the opportunity to comment on any application to vary or discharge a production order. It is, of course, open to the Minister to file an affidavit in response to such an application, e.g. to clarify why certain information is foreseeably*

*relevant and to address any allegations of material non-disclosure. Such an affidavit may assist both the Court and the Minister's case."*

40. In my view, it was always open to the Minister to file an affidavit in response to the application for a right of review thus providing the Court with more information about what disclosure had already been provided to the Requesting State. However, I find that in this application for a right of review, the Respondent, on which the onus rests, could more easily have provided particularised evidence checked against the list of information requested in the 2020 Production Order and that they had indeed provided the specific requested information. The highest that the General Counsel puts it is that the Finance Director informed him "*that the ITA have already been provided with a wealth of information for the periods in question, akin to that now requested, in the context of the current and long-running dispute between the Company and those authorities".* This statement leads the Court to be in a vacuum about whether the information already provided previously is the specific information that has been requested in the 2020 Production Order. In light of the absence of any particularised list, the Court is wholly unable to say whether this complaint gives rise to an arguable ground for review.

**Ground 4**

41. The Respondent submits that the information sought is irrelevant, oppressive and a fishing expedition. In the General Counsel's affidavit dated 13 April 2020 he states that he has been informed by the Finance Director/Global Tax/Global Payroll about certain matters with the ITA. However, the General Counsel does not make any assertions in the affidavit that the requirements in the 2020 Production Order are not relevant, are oppressive or are a fishing expedition. He does not explain any "global nature of the business" in any way although written submissions by Counsel did refer to "notwithstanding the global nature of the Respondents' business". The General Counsel requests that the Court consider his affidavit dated 28 February 2019 ("the 2019 Affidavit") and exhibited to his affidavit of 13 April 2020. In that 2019 Affidavit, the General Counsel does not explain any "global nature

of the business" although he asserts that it is a "fishing expedition" and "oppressive". In paragraph 11 he states as follows:

> *"11. Furthermore, the other information required to be produced is so extensive, disparate and wide-ranging that it is the view of the Company compellingly obvious that the Government of India is engaged in a "fishing expedition". In any event, having regard to the nature and extent of the information sought and its dubious relevance it is the Company's submission that the 2019 Production Order is oppressive. The Company's right to review the Production Order would in such circumstances be an empty shell if it was not permitted to see the documents placed before the Learned Chief Justice on the ex parte application including the request from the Government of India to test compliance of the request with the Bermuda – India Tax Information Agreement of 7 October 2010."*

42. Mr. Watson then made submissions about relevance and made reference to Article 1 and Article 4(2) of the Agreement.

> *"The competent authorities of the Contracting Parties shall provide assistance through exchange of information that is relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this Agreement. Such information shall include information that is relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. Information shall be exchanged in accordance with the provisions of this Agreement. The rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information.*
>
> *Article 4(2). The term "relevant" wherever used in the Agreement with respect to information, shall be interpreted in a manner that ensures that information will be considered relevant notwithstanding that a definite assessment of the pertinence*

*of the information to an ongoing investigation could only be made following the receipt of the information."*

43. Mr. Watson then set out a factual basis: (a) The Respondent does not know the tax purpose for which the information is sought or the tax period[1] under assessment which is important to an assessment of relevance. (b) Mr. Watson invites the Court to review the extensive information sought by the Government of India in the 2015 Production Order, which was set aside by the Court, the subjects under investigation being the Two Taxpayers. He submits that there is significant overlap of information sought in the 2015 Production Order to the 2020 Production Order concerning a tax investigation against the Respondent itself. (c) In respect of the periods requested for review, he submits that in his affidavit the General Counsel states that assessments have already been made by the ITA for these financial periods and the assessments are in the process of appeals. He complains that it is difficult to see the relevance of the information post-assessment during the tax appeal process. (d) As there is a narrow scope of tax issues in dispute between the Respondent and the Government of India per the March 2019 Ruling on an appeal concerning the 2013-14 year, that the extensive breadth of the information sought, exemplifies the fishing expedition nature of the request.

44. In summary, the Respondent complains that the failure to disclose these matters is a further instance of material non-disclosure as they were material to the Minister's and Court's consideration whether the information was relevant to the tax purpose and period. In further support of the irrelevance and oppressive/fishing nature of the request, it is submitted that none of the categories of financial information are limited to India notwithstanding the global nature of the Respondent's business and various requests are directed at information concerning management, directors and shareholders of the Respondent – the difficulty being how do these categories have any relevance to a tax investigation in India of the Respondent. The Respondent submits that given the tax purpose of the investigation is unknown to them, then there is an arguable case that some or all of the requests are not

[1] The Company submits that it can infer the period under assessment is fiscal years 2013-2014, 2014-15 and 2015-16 having regard to the categories of information sought.

foreseeably relevant to a tax investigation of the Respondent in India or may be used for a collateral purpose given the history of the failed production orders.

45. Mr. Watson submits that it is (a) for the Court to determine what is foreseeably relevant and (b) for the Minister prior to coming to Court to satisfy himself that it is foreseeably relevant. He rejects Mr. Elkinson's submission that it is for the Requesting Party to determine what is foreseeably relevant. Mr. Elkinson submitted that it does not have to be demonstrably relevant.

46. Mr. Watson relied on *Minister of Finance v Ap* [2016] SC (Bda) 30 Civ where Hellman J stated as follows:

> *"48. When construing a TIEA, a court may refer to extrinsic materials which form part of the legal context (these include accepted model conventions and official commentaries thereon) without the need to find an ambiguity before turning to them….*
>
> *49. The relevant extrinsic material in the present case includes the Commentary to Article 1 of the OECD Model TIEA:*
>
> > *"3. The Agreement is limited to exchange of information that is foreseeably relevant to the administration and enforcement of the laws of the applicant party concerning the taxes covered by the Agreement. The standard of foreseeable relevance is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting Parties are 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. Parties that choose to enter into bilateral agreements based on the Agreement may agree to an alternative formulation of this standard, provided that such alternative formulation is consistent with the scope of the Agreement.*

> *4. The Agreement uses the standard of foreseeable relevance in order to ensure that information requests may not be declined in cases where a definite assessment of the pertinence of the information to an on-going investigation can only be made following receipt of the information."*

> *56. In the present case, the range of the material sought by the Plaintiff was very wide. To take but two examples, it included details of all movable and immovable assets held by the Defendant since its incorporation and complete details of its Indian operations. The Defendant has filed unchallenged affidavit evidence from its senior corporate counsel, Mr E, that it is not a "typical" Bermuda holding company, incorporated simply to hold shares in operating subsidiaries established elsewhere, but an international operating company with offices in 12 countries, assets worldwide, and a consolidated turnover for the financial year ending 31st March 2015 of US$ 264 million. Considered in this context, I regard elements of the Request, such as the examples which I have just cited, as being a fishing expedition.*

> *57. On the other hand, I do not accept the Defendant's submission that the only foreseeably relevant material requested is that which relates to the Three Accounts. Eg had I not discharged the Production Order I would have held that any material relating to transactions carried out or authorised by or on behalf of any of the 13 Attorneys, and details of any office or senior management position held by them in the Defendant, was also foreseeably relevant."*

47. Mr. Elkinson submitted in reply that *Ministry of Finance v Ap* [2016] SC (Bda) 30 Civ was a case where there was already a right of review granted and an order that the Plaintiff disclose to the Defendant the documents filed with the Court on the Plaintiff's ex parte application. In the present case, the foreseeable relevance was being tested against the application for a right of review, that is, without disclosure.

48. In my view, at this stage of the proceedings, I am satisfied that there are arguable grounds for a review of the 2020 Production Order.

49. First, I recognise that the present stage of proceedings is an application for a right of review and that Mr. Watson has conceded that the purpose of the investigation is not known to the Respondent. In any other case, if the purpose of the investigation was not known, that might be a good start point to dismiss this ground. However, there is merit in Mr. Watson's invitation to look at the history of all the matters between the Respondent and the Minister on behalf of the Government of India and use that information as a basis to determine whether the 2020 Production Order is irrelevant, oppressive and a fishing expedition.

50. Second, the unchallenged evidence is that 2020 Production Order overlaps with the 2015 Production Order, in particular Part II, which was set aside by the Supreme Court and the Minister's appeal was dismissed by the Court of Appeal. These circumstances warrant a review.

51. Third, the unchallenged evidence is that there have been ITA assessments and several appeals are underway. The question begs as to why there is a request for tax information post-assessment. Again, these circumstances warrant a review.

52. Fourth, on the basis that the 2020 Production Order is identical in all material respects to the 2019 Production Order save that references to "*taxpayer*" in Categories 14-19 have been replaced with "*the Company",* I accept the assertions in the General's Counsel's 2019 affidavit that the information required to be produced is so "*extensive, disparate and wide-ranging*" as well as to the "*nature and extent of it*". I have considered the lack of evidence about the "global nature of the business" but I am not persuaded that such lack undermines these findings. At the very least, the Respondent operates in India and Bermuda. Again, these circumstances warrant a review.

53. Fifth in light of the above findings, it follows that it is arguable that some of the items in the list of requested documents are oppressive due to the world-wide effect, a fishing expedition and not foreseeably relevant to a tax investigation of the Respondent in India.

Some examples include (a) Lists of assets (both current and non-current) of the Respondent along with location of the assets; (b) Information of all the employees of the Respondent, together with their location of work, country of residence, nationality and payroll expense (including salary, bonus, pension and other benefits); (c) 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; (d) The location of board of directors' meetings and names of persons who attended the meeting. (e) Copies of Minutes of meetings and board resolutions for all board of directors' meetings for fiscal year; (f) The location of shareholders' meetings and the names of persons who attended the meetings. (g) Copies of minutes of meeting for all shareholders' meetings for relevant years. (h) Information in relation to delegation of authority of board members to any executive committee/promoter/shareholder; (i) Copies of all documents submitted by the Respondent to the Bermuda Government for incorporation. (j) The names of beneficial shareholder(s) of the Respondent; and (k) Identify the location(s) of all server(s) and/or 'a network centre' of the Respondent.

54. In light of the above reasons, I am satisfied that this complaint gives rise to an arguable ground for review.

**Ground 5**

55. The Respondent submits that the Minister's decision to apply for the 2020 Production Order was unreasonable and/or irrational. Mr. Watson submits this for several reasons: (a) Good reasons must have existed for the Minister to discontinue the identical 2019 Production Order which reasons must equally apply to the 2020 production Order; (b) The Minister operated on a material mistake of fact if he believed the Article 5, paragraph 6(h) requirements was fulfilled; and (c) The Minister failed to reasonably and rationally consider whether the information sought was relevant to the request.

56. I rely on my findings in relation to Ground 3 above where I found that the Court is wholly unable to say whether this complaint gives rise to an arguable ground for review. This was on the basis that there was an absence of a particularized list of information already

supplied to the ITA. In my view, I am unable to conclude that the Minister's decision was unreasonable and/or irrational.

57. First, the Minister followed the procedure of the statutory scheme. It may well be true that the Minister had good reasons to discontinue the 2019 Production Order. However, it is a far cry as well as speculative to assert that those same reasons must equally apply now in order to deny the 2020 Production Order. There has been a change in the circumstances, namely the Respondent were now the subject of the tax investigation in India and time has passed such that other events may have changed in the interval period.

58. Second, the Request would have had a statement in it that Article 5 paragraph 6(h) had been complied per the wording in the TIEA "*a statement that the requesting Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties."* The Minister would have been obliged to accept this statement on the face of it.

59. Third, in respect of a failure by the Minister to reasonably and rationally consider whether the information sought was relevant, I rely on my findings in Ground 4 above where I found that the Production Order was oppressive, a fishing expedition and some of the information requested was not foreseeably relevant. Mr. Watson seems to be saying that if having made those findings, it follows that the Minister did not undertake a reasonable and rational consideration of relevance. I disagree. Again, I find this to be speculative as it is quite open to say that the Minister did undertake a reasonable and rational consideration of relevance and was entitled to come to the decision that he did.

60. In light of the above, I am unable to conclude that this complaint gives rise to an arguable ground for review.

**Ground 6**

61. The Respondent submits that the 2020 Production Order is an abuse of process. Mr. Watson for the Respondent submits that (a) The 2019 Production Order and the 2020 Production

Order involve identical parties and identical subject matter. (b) There is no explanation known why the Minister has vexed the Respondent with the same Production Order twice and could not have litigated the issue within the 2019 Production Order. (c) There is a history of repeated commencement and abandonment of Production Orders against the Respondent and related entities all emanating from the Government of India. (d) The Respondent has not received payment of its costs arising from the discontinuance of the 2019 Production Order. (e) The Government of India has not exhausted all available means to request the information from the Respondent within India. (f) The Respondent is entitled to have finality as to its tax affairs.

62. Mr. Watson relies on the case of *USB AG v Tyne* which states at paragraph 46:

> *"46 Nor does the undue vexation which a stay of proceedings is concerned to prevent arise only when proceedings in respect of the same issue have been concluded by a judgment on the merits. Serial proceedings discontinued prior to judgment would be an obvious example of an abuse of process. The pursuit of substantially the same claim by serial proceedings conducted by different entities under common control is no less obviously an abuse of process."*

63. Mr. Watson also relies generally on *USB AG v Tyne* as follows:

> *"45 The courts must be astute to protect litigants and the system of justice itself against abuse of process. It is to hark back to a time before this Court's decisions in Aon and Tomlinson and the enactment of s 37M of the FCA to expect that the courts will indulge parties who engage in tactical manoeuvring that impedes the "just, quick and efficient" resolution of litigation. To insist, for example, on "inexcusable delay" as a precondition of the exercise of the power to stay proceedings as an abuse of process is to fail to appreciate that any substantial delay is apt to occasion an increase in the cost of justice and a decrease in the quality of justice. And other litigants are left in the queue awaiting justice. Further, there is no reason why the courts should tolerate attempts to manipulate other parties and the courts themselves by the deployment, by a single directing mind and will, of*

> *different legal entities under common control for such a purpose. The concern is as to whether the processes of the court are being abused. Given that this is the central concern, the circumstance that the abuse is effected by the use of multiple entities orchestrated by a single mind and will is no reason to tolerate it."*
>
> *59. For the Federal Court to lend its procedures to the staged conduct of what is factually the one dispute prosecuted by related parties under common control with the attendant duplication of court resources, delay, expense and vexation, as Dowsett J found, is likely to give rise to the perception that the administration of justice is inefficient, careless of costs and profligate in its application of public moneys. The primary judge was right to permanently stay the proceedings as an abuse of the processes of the Federal Court."*

64. Mr. Watson also relies on the principles in the recent Supreme Court of the United Kingdom decision of *Test Claimants in the Franked Investment Income Group Litigation & Others v Commissioners of Inland Revenue* [2020] UK SC 47 (7 December 2020) (Test Claimants) as follows:

> *"59. The rules or concepts of res judicata, estoppel, and abuse of process support the same legal policies, namely "that there should be finality in litigation and that a party should not be twice vexed in the same matter": Johnson v Gore Wood & Co [2002] 2 AC 1, p 31, per Lord Bingham of Cornhill. Lord Bingham went on to state: "This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole."*
>
> *75. While the concept of abuse of process informs the exercise of the court's procedural powers, it is not a question of the exercise by the court of a discretion: Aldi Stores Ltd v WSP Group plc [2017] EWCA Civ 1260; [2008] 1 WLR 748, para 16 per Thomas LJ, para 38 per Longmore LJ. If the court, on making the broad, merits-based judgment of which Lord Bingham spoke, concludes that a claim, a defence, or an amendment of a claim or of a defence involves an abuse of process or oppression of the opposing party, it must exclude that claim, defence or amendment. A finding of abuse of process operates as a bar. Thus, as Lord Wilberforce stated in delivering the judgment of the Judicial Committee of the Privy Council in Brisbane City Council v Attorney General for Queensland [1979] AC 411, 425, the doctrine Page 30 "ought only to be applied when the facts are such*

> *as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation."*
>
> *76. From these authorities it is clear that for the court to uphold a plea of abuse of process as a bar to a claim or a defence it must be satisfied that the party in question is misusing or abusing the process of the court by oppressing the other party by repeated challenges relating to the same subject matter. It is not sufficient to establish abuse of process for a party to show that a challenge could have been raised in a prior litigation or at an earlier stage in the same proceedings. It must be shown both that the challenge should have been raised on that earlier occasion and that the later raising of the challenge is abusive."*

65. In my view, I am obliged to keep my focus on the target, that this is an application for a right to review the issue of the 2020 Production Order and for disclosure of the information and documents provided to the Court in support of its application. The Respondent's Summons did not seek a stay for abuse of process. The Respondent has not seen such documents but if the final result in this application is that it has established a right of review and such disclosure then it will be proceeding with the information in support of the 2020 Production Order. Otherwise, it is proceeding without the information and its submissions at this stage in respect of abuse of process are on a tentative basis and fall on the side of conjecture and speculation, which in my view, would be detrimental for an application for abuse of process. I rely on Test Claimants which cited *Brisbane City Council v Attorney General for Queensland* where Lord Wilberforce stated the doctrine "*ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation*".

66. I have accepted from the cited cases and generally that the Courts will always have the power to protect itself from an abuse of process at any stage of proceedings. However, I am of the view that I have to balance this power against the statutory scheme of the treaty agreements. The start point would be to recognize, as Mr. Elkinson stated, that the TIEA is a "*Government to Government*" agreement to give effect to a treaty with the Government of India to facilitate requests for information in tax investigations. In Bermuda, the Government enacted the 2005 Act to establish a procedure as set out above. In particular,

the statutory scheme allows for an aggrieved subject of a Production Order to apply to the Court for a section 5(6) and 6(B) right of review and section 5(6A) right to disclosure.

67. Most significantly, the Court is empowered by section 5(7) to vary or discharge the Production Order, a discharge effectively bringing the Production Order to an end. In my judgment, these circumstances at this stage do not engage a finding of abuse of process and a bar of further proceedings. On that basis, I am unable to conclude that this complaint gives rise to an arguable ground for review.

**Ground 7**

68. Counsel for the Respondent submits that the entitlement of the Respondent to the details of the request in Article 5, paragraph 6 is in accordance with the Court of Appeal's decision in *Minister of Finance v Bunge Ltd* [2013] Bda LR as follows:

> *"(a) on the true construction of section 5(1) of the 2005 Act, the person on whom the notice is served is entitled to see, and the Minister is bound to produce, the terms of the Request, so far as they are relevant to the notice that is given. Hence the Judge`s qualified ruling "so much of the Request as is necessary to show that the statutory requirements for the Request have been complied with, but redacted to exclude any sensitive material" (judgment para.39), with which we agree. Without production of the terms of the Request, the person cannot know that the notice is valid;*
>
> *(b) the "principle of justice and fairness" applied in Lewis & Ness both supports the above construction of the 2005 Act and provides an independent ground for requiring production of the terms of the Request in a particular case;"*

69. Mr. Watson submits that as a matter of common law the Minister is bound to produce so much of the Request from the Government of India (redacting any sensitive material) to show that the requirements in Article 5, paragraph 6(a)-(h) have been complied with, or alternatively it could have been incorporated in the form of the order made by the Court

when granting a production order. He relies on *Minister of Finance and DEF Limited* wherein the Chief Justice recognized that "*crystal clear*" language is required to abrogate common law rights and that section 5(6A) does not contain "*crystal clear*" language removing a recipient's entitlement to know the terms of the request. Mr. Watson also relied on Article 1 of the TIEA as follows:

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

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.

**Conclusion**

72. The Respondent has satisfied the Court that it has arguable grounds for review of the 2020 Production Order on the basis set out in Ground 1 and 4 above. I grant to the Respondent a right of review of the 2020 Production Order issued ex parte by the Court and I so order.

73. I grant the Respondent's application for disclosure of the documents filed with the Court by the Minister on his ex parte application to obtain the 2020 Production Order and I so order subject to the redaction of any sensitive material.

74. I did find that the Respondent should be provided with as much information of the 2020 Request as necessary, redacting any sensitive material, to show that the requirements in Article 5, paragraph 6(a)-(h) have been complied with and I so order. However, in practical terms, the documents in support of the ex parte application – which should include the 2020 Request - have also been ordered to be disclosed in full subject to redaction of sensitive material.

75. The Court shall hear the Parties as to costs.

Dated 26 January 2021

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