In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014: Nos E, F and H

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

BETWEEN:-

MINISTRY OF FINANCE

Plaintiff

-and-

(1) E
(2) F
(3) H

Defendants

2014: No O

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

MINISTRY OF FINANCE

Plaintiff

-and-

O

Defendant

RULING

(In Chambers)

Date of hearing: 5th May 2014
Date of ruling: 30th May 2014

Mr David Kessaram, Cox Hallett Wilkinson Limited, Mr Leighton Rochester, Ministry of Finance, and Mr Wayne Brown, Assistant Financial Secretary, for the Plaintiff

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

Introduction

1. Nation States have a legitimate interest in collecting all the taxes to which they are lawfully entitled. Taxpayers have a legitimate interest in paying no more in tax than they are lawfully required to pay. Mutual legal assistance has a role to play in assisting States to gather the information necessary to assess the tax due from taxpayers, collect it, and prosecute taxpayers who are alleged to have committed tax offences.

2. To this end, the Government of Bermuda has entered into a number of tax information exchange agreements ("TIEAs") with other jurisdictions and enacted legislation to enable requests made pursuant to those agreements to be given effect here. Requests from the United States are dealt with under the USA – Bermuda Tax Convention Act 1986 ("the 1986 Act"). Requests from other States are dealt with under the International Cooperation (Tax Information Exchange Agreements) Act 2005 ("the 2005 Act").

3. The 2005 Act was recently amended. Previously, the Minister of Finance ("the Minister") would issue a written notice requiring the production of information from the person on whom the notice was served. That person

could challenge the decision to issue the notice or the terms of the notice by way of judicial review.

4. Under the recent amendments, which came into force on 12th December 2013, the Financial Secretary or Assistant Financial Secretary makes an application for a production order to the Court. If the application is successful the Court will make a production order. The party served with the order can then apply to the Court to set it aside or vary its terms.

5. That is what has happened in the instant case. The Defendants in both actions apply to set aside or vary production orders which I made earlier this year. Because some of the issues raised are common to both actions, the applications were heard together and I am issuing one ruling with respect to them both.

The 2005 Act

6. It will be helpful to set out those provisions of the 2005 Act which have a bearing on the instant applications.

7. Section 2 is headed "*Interpretation*". It includes a definition of "*information*" as meaning:

> "*… any fact, statement or record in any form whatsoever that is relevant or material to tax administration or enforcement*"

8. Section 3 is headed "*Duties of the Minister*". It provides at (1) that the Minister is the competent authority for Bermuda under the TIEAs and at (2) that:

> "*The Minister may provide assistance to any requesting party according to the terms of the agreement with that party."*

9. Section 4 is headed "*Grounds for declining a request for assistance*". As the heading suggests, it sets out the grounds on which the Minister may decline a request for assistance.

10. Section 5 is headed "*Production Orders*". It provides in material part:

"*(1) Where the Minister has received a request in respect of which information from a person in Bermuda is required, the Financial Secretary may apply to the Supreme Court for a production order to be served upon the person referred to in the request directing him to deliver to the Minister the information referred to in the request.*

(2) 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 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 the making of the production order.

(3) The period to be specified in a production order shall be 21 days unless it appears to the court, or the Financial Secretary satisfies the court, that a longer or shorter period would be appropriate in the particular circumstances of the production order.

(4) Where a request so stipulates and the production order makes such requirement, information sought shall be in the form of—

(a) depositions of witnesses, disclosed on oath; or

(b) original documents or copies of original documents, certified or authenticated by a Notary Public.

(5) An application for a production order under this section may be made ex parte to a judge in Chambers and shall be in camera.

(6) A person served with a production order under subsection (1) who is aggrieved by the service of the order may seek review of the order within 21 days of the date of the service of the order.

(7) Rules of court may make provision—

(a) for the discharge, variation and review of production orders; and

(c) for proceedings in relation to such orders.

. . . . .

(11) For purposes of this section the Financial Secretary includes an Assistant Financial Secretary."

11. Section 6 is headed "*Statutory duty to provide information*". It provides that a person on whom a production order has been served under section 5 shall provide the information specified in the production order to the Minister within the period specified in the order. However a person is not required to comply with a request for information if the information is not within the person's possession or control.

12. Order 120 of the Rules of the Supreme Court 1985, which was made pursuant to section 5(7) of the 2005 Act, provides rules for obtaining evidence for TIEAs. Of particular relevance is Order 120/2, headed "*Application for production order or other relief*", which includes the following provisions:

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

(2) There must be exhibited to the affidavit the request in pursuance of which the application is made and, if the request is not in the English language, an English translation thereof shall also be exhibited."

13. Bermuda is presumed to legislate in accordance with its treaty obligations. When construing the 2005 Act it is therefore permissible to take into account the terms of the applicable TIEAs and the model conventions and official commentaries which provide their legal context. See, for example, the decisions of the Court of Appeal in Lewis & Ness v Minister of Finance [2004] Bda LR 66 at para 31(applicable treaty) and the Supreme Court of

Canada in Crown Forest Industries Ltd v Canada [1995] 2 SCR 802, 125 DLR (4^{th}) 485 at para 44 (model conventions and official commentaries).

Disclosure

14. The extent to which the Minister is required to disclose a request to the person required to provide information under it has been a historic battleground. See the decisions of the Court of Appeal under the 1986 Act in Lewis & Ness v Minister of Finance [2004] Bda LR 66, and under the 2005 Act prior to the recent amendments in Minister of Finance v Bunge Ltd [2013] Bda LR 83. It arose again at an interlocutory hearing in the instant cases.

15. I ruled that any document disclosed to the court on the hearing of an application for a production order must also be disclosed to the other parties. The Divisional Court so held in R (BskyB Ltd) v Central Criminal Court [2012] QB 785, applying the decision of the UK Supreme Court in Al Rawi v Security Service (JUSTICE intervening) [2012] 1 AC 531.

16. The facts of the R (BskyB Ltd) case are summarised in the headnote:

"The commissioner of police applied for a production order under section 9 of and Schedule 1 to the Police and Criminal Evidence Act 1984, requiring the claimant broadcaster to produce copies of e-mails which had passed between one of its journalists and two named persons. The notice of application stated that access to the e-mails was sought for the purposes of an investigation into offences under the Official Secrets Act 1911 and that some of the evidence which was to be provided to the judge in support of the application would not be provided to the claimant. Before the hearing of the application the judge was provided with the materials on which the commissioner intended to rely, including the secret evidence. After the hearing of the application had opened inter partes the judge heard counsel for the commissioner ex parte with a view to deciding whether the secret evidence should be disclosed to the claimant. In the course of that ex parte hearing the judge heard evidence from a police officer in addition to the secret evidence which he had previously read. He concluded that none of the secret evidence should be disclosed, finding that it neither detracted from nor assisted the claimant's arguments. Having heard further argument inter partes the judge granted the

production order sought. The claimant sought judicial review of the production order on the ground that the procedure by which it had been obtained had been fundamentally unfair and unlawful."

17. The Divisional Court at para 25 of its judgment summarised the decision in Al Rawi thus:

"*In Al Rawi's case [2012] 1 AC 531 the Supreme Court was asked to consider whether it was open to the courts to adopt in a civil claim for damages a closed procedure of the kind used in certain kinds of proceedings where considerations of national security preclude the deployment of highly sensitive material in open court. Their Lordships held that a closed procedure involves too great a departure from the fundamental requirements of a common law trial for the court to adopt it and that in order to do so statutory authority is required.*"

18. The Divisional Court then went on to hold at paras 28 – 29 of its judgment that the principles stated by the UK Supreme Court applied not only to trials but to contested proceedings generally:

"*28 Mr Lewis did not feel able to concede that the principle recognised by the majority in Al Rawi's case applied in this case, because the question in that case was whether a closed procedure could be adopted at trial, whereas here, he submitted, we are concerned only with what is essentially a procedural application for an order in aid of a police investigation. In our view, however, there is no material distinction for these purposes between a trial and any other form of contested proceedings. It is a fundamental* ****796*** *principle of fairness at common law that a party should have access to the evidence on which the case against him is based and thus an opportunity to comment on it and, if appropriate, challenge it. Moreover, as Mr Millar pointed out, from BSkyB's perspective these are independent proceedings by which the commissioner seeks to obtain access to private property of a sensitive kind. In R (Malik) v Manchester Crown Court [2008] 4 All ER 403 it was assumed without argument that a closed procedure could be adopted on the hearing of an application for a production order under the Terrorism Act 2000 , but in so far as that case supports the conclusion that a closed procedure may be adopted on an application of the present kind, we consider that it must be regarded as having been overruled by Al Rawi's case.*

29 It follows that in our view the procedure adopted in this case was unlawful. Mr Lewis submitted that, since the judge found that the secret evidence "did not detract from or assist the arguments put forward by BSkyB", viewed overall there was no unfairness and

we should exercise our discretion in favour of refusing relief. In our view, however, that misses the point. Here there was a failure to observe a fundamental principle of law bearing directly on the fairness of the proceedings, a matter which the court should be very slow to condone. Moreover, however carefully the judge considered the secret evidence, that can be no substitute for allowing BSkyB to challenge it, for the reasons given by Lord Kerr JSC in Al Rawi's case. For this reason we consider that it would not be a proper exercise of our discretion to allow the order to stand and it must therefore be quashed."

19. I concurred. Each Defendant was therefore entitled to see all the documents which the Plaintiff had placed before the Court in that Defendant's case. Disclosure duly took place prior to the substantive hearing of the applications to set aside or vary the production orders.

20. There is in principle no reason why, in order to avoid disclosing sensitive information, the Plaintiff should not redact the request before it is placed before the Court. However the redacted request must contain sufficient information for the Court to satisfy itself that the requirements of the applicable TIEA have been complied with.

Information

21. The production orders served on the Defendants E, F and H require them to produce information on various matters such as what are their activities and what are the means used to carry them out; and the date and means of acquisition of licences, patents and intangible assets.

22. The production of this information cannot be satisfied simply by producing copies of pre-existing documents but will require the preparation of a document setting out the information required.

23. The 2005 Act provides for the production of a deposition, but no deposition has been requested. It does not provide expressly and in specific terms for the preparation of any other form of document.

24. The Defendants E, F and H submit that accordingly the Court is unable to give effect to a request insofar as it requires information but does not specify how that information is to be provided. To hold otherwise, it is submitted, would be to put the Defendants in the invidious position of having to provide information but not knowing what is required to satisfy that requirement.

25. There is no merit to this objection. "*Information*" is defined broadly in the 2005 Act. It includes "*… any fact … in any form whatsoever that is relevant or material to tax administration or enforcement*". That definition does not require that the fact must be provided in the form of a pre-existing document.

26. Section 5(4) of the 2005 Act provides that the information to be provided shall be in the form of a deposition, or alternatively original documents, "*[w]here a request so stipulates and the production order makes such requirement*". In other words, the request *may* specify what form the information should take, and where it does so the production order may reflect this, but there is no requirement that a request or production order *must* so specify.

27. It is not necessary, in order to arrive at the correct interpretation of section 5(4), to have recourse to the text of the Model TIEA produced by the OECD and the official commentary thereto. However these documents do provide support for that interpretation.

28. Article 5(3) of the Model TIEA provides:

> "*If specifically requested by the competent authority of an applicant Party, the competent authority of the requested Party shall provide information under this Article, to the extent allowable under its domestic laws, in the form of depositions of witnesses and authenticated copies of original records.*"

29. The official Commentary to the Model TIEA states:

> "*Paragraph 3 includes a provision intended to require the provision of information in a format specifically requested by a Contracting Party to satisfy its evidentiary or other*

legal requirements to the extent allowable under the laws of the requested Party. Such forms may include depositions of witnesses and authenticated copies of original records. Under paragraph 3, the requested Party may decline to provide the information in the specific form requested if such form is not allowable under its laws. A refusal to provide information in the format requested does not affect the obligation to provide information."

30. The application by Defendants E, F and H to set aside the production orders made against them is therefore dismissed. I am sceptical as to whether any of those Defendants has any real doubts as to what material they are to provide. If they do, they can attempt to resolve the matter with the Plaintiff. If such attempt proves unsuccessful, they can seek clarification from the Court.

Retrospective effect

31. The production order served on Defendant O requires the production of (i) copy documents concerning any insurance policies held in the Defendant by a named taxpayer for the period 1st January 2004 to 31st December 2012; and (ii) copy documents concerning any agreements and transactions concerning any insurance policies held in the Defendant by another named taxpayer for the same period.

32. The request states that the purposes for which the information is requested are (i) the determination, assessment and collection of taxes; and (ii) the investigation or prosecution of criminal tax matters.

33. That the request concerns criminal tax matters is underlined by the statement in the request that a named person or entity is suspected of having, "*by intentional conduct*", failed to report some taxable income to the tax authorities in the requesting State. "*Intentional conduct*" forms part of the definition of "*criminal tax matters*" in Article 4 of the Model TIEA:

"*the term 'criminal tax matters' means tax matters involving intentional conduct which is liable to prosecution under the criminal laws of the applicant Party.*"

34. Mr Elkinson, who appears for Defendant O, initially submitted that the request did not concern criminal tax matters. In light of the terms of the request that submission is simply not tenable.

35. The applicable TIEA ("the Agreement") entered into force on 24th December 2009. Article 13(2) of the Agreement provides that it shall thereupon have effect:

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

36. Mr Elkinson submits that therefore, pursuant to the Agreement, the Court can only order the production of material relating to taxes falling due, or criminal tax matters arising, on or after 1st January 2010. The production order, Mr Elkinson submits, should in consequence be varied so as to require the production of material from that date but no earlier.

37. The answer to this point is that, insofar as criminal tax matters are concerned, Article 13(2) of the Agreement does not provide that the criminal tax matter to which a request relates must arise on or after 1st January 2010: it provides that no request relating to a criminal tax matter, irrespective of when that matter arose, may be made prior to 1st January 2010. It is only with respect to matters other than criminal tax matters that any limitation as to the date on which they arose applies under the Article.

38. The Jersey Court of Appeal construed an analogous provision of another TIEA the same way in Volaw Trust and Corporate Services Limited and another v The Officer for the Comptroller of Taxes [2013] JCA 239 at para106.

39. Treaties are presumed not to have retrospective effect unless the contrary intention appears. Article 28 of the Vienna Convention on the Law of Treaties 1969 is headed "*Non-retroactivity of treaties*". It provides:

> "*Unless a different intention appears from the treaty or as otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry-into-force of the treaty with respect to that party.*"

40. As the Court of Appeal of England and Wales stated in Ben Nevis (Holdings) Limited v Commissioners for HM Revenue and Customs [2013] EWCA Civ 578 at para 43:

> "*the basic rule on non-retroactivity reflected in Article 28 may be taken to be declaratory of existing rules of customary international law binding on all States (Ambatielos case (Preliminary Objections) ICJ Rep. (1952) 40 ; Sinclair, The Vienna Convention on the Law of Treaties , 2nd Ed. (1984) p. 85).*"

41. The same presumption applies to domestic legislation. As stated in Bennion on Statutory Interpretation, Sixth Edition, at 291, in a passage which was approved by the Privy Council in Spread Trustee Co Ltd v Hutchison [2012] AC 194 at para 65:

> "*Unless the contrary intention appears, an enactment is presumed not to have a retrospective operation.*"

42. The rationale for the presumption against retrospectivity has been stated variously by different judges and textbook writers. In my judgment that rationale is the same or substantially similar whether the presumption arises in the context of a treaty or the context of a domestic statute.

43. I find the following formulation by Lord Scott to be helpful. It was given in his judgment in the decision of the House of Lords in Wilson v First County Trust Ltd (No 2) [2004] 1 AC 816 at para 153:

"*It is, of course, open to Parliament, if it chooses to do so, to enact legislation which alters the mutual rights and obligations of citizens arising out of events which predate the enactment. But in general Parliament does not choose to do so for the reason that to legislate so as to alter the legal consequences of events that have already taken place is likely to produce unfair or unjust results. Unfairness or injustice may be produced if persons who have acquired rights in consequence of past events are deprived of those rights by subsequent legislation; or it may be produced if persons are subjected on account of those past events to liabilities that they were not previously subject to. There is, therefore, a common law presumption that a statute is not intended to have a retrospective effect. This presumption is part of a broader presumption that Parliament does not intend a statute to have an unfair or unjust effect (see Maxwell on Interpretation of Statutes, 12th ed (1969) , p 215 and Bennion's Statutory Interpretation, 4th ed , pp 265-266 and 689-690). The presumption can be rebutted if it sufficiently clearly appears that it was indeed the intention of Parliament to produce the result in question. The presumption is no more than a starting point.*"

44. I have found that with respect to criminal tax matters Article 13(2) of the Agreement bears the meaning set out at para 37 above and I am satisfied that the legislature intended that the Court, when considering a request, should give full force and effect to that Article. It is therefore not strictly relevant whether the Article has retrospective effect.

45. However I am satisfied that Article 13(2) does not have retrospective effect with respect to criminal tax matters in that it does not give effect to domestic legislation that alters the mutual rights and obligations of citizens arising out of events which took place before that legislation was enacted. In the words of Willes J in Phillips v Eyre (1870) LR 6 QB 1 at 23, it does not "*change the character of past transactions carried on upon the faith of the then existing law*". I am in any case satisfied that giving effect to the request in the instant case would not have an unfair or unjust effect.

46. One of the purposes for which the information is requested is the investigation or prosecution of criminal tax matters: the other is the determination, assessment and collection of taxes. On the face of it the two purposes are separate and distinct. However they are most probably

interrelated in that the amount of tax owing is likely to be relevant to the question of the taxpayer's criminal liability.

47. Moreover, Article 8 of the Agreement, which is headed "*Confidentiality*", provides:

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

48. Thus the requesting State may use information disclosed for one purpose under the Agreement for any other purpose for which information can be requested under the Agreement.

49. Material which predates 1st January 2010 might anyhow be relevant to taxes falling due on or after that date. Although I am unable to say whether it is in fact relevant for this reason. Article 15(4) of the Model TIEA contains the rules on the effective dates of the TIEA. The Commentary states at para 114:

> "*The rules of paragraph 4 do not preclude an applicant Party from requesting information that precedes the effective date of the Agreement provided it relates to a taxable period or chargeable event following the effective date.*"

50. In all the circumstances I am satisfied that there is no merit to the retrospectivity point.

51. During the course of oral argument I canvassed with the parties whether the Plaintiff had established that the period for which material was to be produced should date back as far as 1st January 2004. I am satisfied that the Plaintiff has established that it should.

52. The application by Defendant O to set aside the production order made against that Defendant is therefore dismissed.

53. Defendant O submits that it is an independent third party operating at arm's length from the taxpayer under investigation, and that therefore the Plaintiff should bear the costs of its compliance with the production order. The Plaintiff submits that Defendant O should bear the costs.

54. I shall adjourn consideration of that point to give the parties the opportunity to make more detailed submissions.

Minister's decision to honour the request in the interest of Bermuda

55. I am satisfied that the conditions of the applicable TIEAs relating to the requests before the Court have been fulfilled. It is therefore unnecessary for me to consider the alternative ground on which production orders were sought, namely that the Minister had decided to honour the requests in the interest of Bermuda. As I have heard argument on the point I shall, at the request of both parties, nonetheless make some general observations about this ground. They are, however, *obiter*.

56. Section 3(2) of the 2005 Act provides that the Minister may provide assistance to any requesting party "*according to the terms of the agreement with that party*".

57. Section 5(2) of the 2005 Act provides that the Court may make a production order where it is satisfied with the Minister's decision to honour a request in the interest of Bermuda even where it is not satisfied that the conditions of the applicable agreement relating to a request are fulfilled.

58. Mr Elkinson submits that there is a tension between these two provisions which should be resolved in favour of section 3(2) as it is from this section that the Minister's power to assist a requesting party is derived. Thus, he submits, as section 3(2) provides that the Minister may only provide assistance to any requesting party according to the terms of the agreement with that party, a ministerial decision to honour a request in the interest of

Bermuda which did not satisfy the conditions of that agreement would be *ultra vires*.

59. Mr Kessaram, who appears for the Plaintiff, submits that there is in fact no tension. Article 7 of the TIEAs applicable to the requests, which in both TIEAs is headed "*Possibility of Declining a Request*", provides that the requested party may decline to assist in various specified circumstances, including where the request is not made in conformity with the TIEA. Article 7 of the Model TIEA includes an analogous provision.

60. The OECD Manual on the Implementation of Exchange of Information Provisions for Tax Purposes includes, in the Module on General and Legal Aspects of Exchange of Information, a commentary on Article 7. This states at paragraph 34:

> "*The legal obligation to supply information is lifted in a number of limited situations. These exceptions are contained in … Article 7 of the Model Agreement. In the rare cases where the exceptions apply, the contracting parties are not obligated to provide information. The decision to provide or not to provide the information is then left to the discretion of the requested contracting party. It follows that a competent authority may decide to provide the information even where there is no obligation to do so. If a competent authority does provide the information it still acts within the framework of the agreement.*" (Emphasis added.)

61. In light of Article 7 of the applicable TIEAs, read in conjunction with the commentary on the Article in the OECD Manual, I am satisfied that section 3(2) of the 2005 Act authorizes the Minister to make a decision to honour a request in the interest of Bermuda where the conditions of the applicable agreement relating to the request are not fulfilled. Thus, although nothing turns on this, the decision is made pursuant to statute and does not involve the exercise of a prerogative power.

62. The requirement that the Court must be "*satisfied with the Minister's decision to honour a request in the interest of Bermuda*" means that the Court must be satisfied *that* the Minister decided to honour a request in the interest of Bermuda, not that the Court is competent to judge the merits of

the Minister's decision. But that does not exempt the Minister's decision from judicial scrutiny altogether.

63. The proper role of the Court is analogous to its role in cases involving questions of national security. In R (Naik) v Secretary of State for the Home Department [2011] EWCA Civ 1546, Carnwath LJ reviewed recent House of Lords authority on the point and at para 48 summarised the position thus:

> "*Ministers, accountable to Parliament, are responsible for national security; judges are not. However, even in that context, judges have a duty, also entrusted by Parliament, to examine Ministerial decisions or actions in accordance with the ordinary tests of rationality, legality, and procedural regularity, and, where Convention [and, in Bermuda, Constitutional] rights are in play, proportionality. In this exercise great weight will be given to the assessment of the responsible Minister.*"

64. In the instant case, Mr Kessaram submits that any non-conformity of a request with the corresponding TIEA:

> "*could properly be (and may well have been) thought to be outweighed by concern of a possible accusation by [the requesting State] that Bermuda was not complying with its treaty obligations and be the cause of financial repercussions to Bermuda's international business sector*".

65. It is extremely doubtful whether a decision to honour a request on that basis would be lawful. Bermuda does not have any treaty obligation to honour a request that does not comply with the applicable TIEA. Under the 2005 Act the final arbiters of whether a request does comply are the courts.

66. What Mr Kessaram in effect proposes is that, by deciding to honour a request, the Minister can circumvent the statutory scheme by treating the requesting State, rather than the courts, as the final arbiter of whether a request complies with the applicable TIEA.

67. Were the Minister to honour a request on that basis he would *prima facie* be acting unlawfully in that he would be using a power conferred on him by statute for an improper purpose, namely to defeat the legislative intent that the courts should be the final arbiters of whether a request complies with the applicable TIEA.

Practice note

68. Any accusation by a requesting State that Bermuda is not complying with its treaty obligations is unlikely to be well founded. The legislative steer of section 5(2) of the 2005 Act is that, where the Court is satisfied that the conditions of the applicable TIEA have been fulfilled, it should make a production order. The courts in this jurisdiction have consistently demonstrated a willingness to do so.

69. However the Court does not apply a rubber stamp. A production order imposes obligations upon the person on whom it is served. Failure to comply with a production order without reasonable excuse is an offence which attracts a fine, or imprisonment, or both. The potentially serious consequences of non-compliance underline that it is important for the Court, before making a production order, to satisfy itself that the requirements for doing so have been satisfied.

70. The request for a production order should explain how the requested information relates to the purpose for which it is sought. It is not for the Court to speculate. If the request does not do so, the Court is likely to adjourn the application pending receipt of an adequate explanation. This is not because the Court wishes to be obstructive, but because the Court takes its duty under the 2005 Act seriously.

71. This situation ought not to arise very often because before making an application the Plaintiff should have reviewed the request to ensure that it complies with the applicable TIEA. Alternatively the Plaintiff should refer the request to the Attorney General's Chambers for this purpose. If further

information is required then the Plaintiff should liaise with the requesting State to obtain it. That is how mutual legal assistance is supposed to work.

72. Thus the Update to Article 26 of the OECD Model Tax Convention and its Commentary, which was approved by the OECD Council on 17th July 2012, states at para 5:

> "*The competent authorities should consult in situations in which the content of the request, the circumstances that led to the request, or the foreseeable relevance of requested information are not clear to the requested State.*"

Summary

73. The applications to set aside the various production orders are dismissed. The Defendants E, F, H and O must comply with the orders within 21 days of the date of this judgment.

74. The question of whether Defendant O, or alternatively the Plaintiff, should bear the costs of Defendant O's compliance with the production order is adjourned for further argument to a date to be fixed with a time estimate of 1 hour.

75. Alternatively, if both parties so wish, I am prepared to deal with the question by way of written submissions. These should be filed and served within seven days of the date of this judgment, with any replies filed and served within seven days thereafter. I should be grateful if the parties would let my assistant know how they wish to proceed.

76. The resolution of this question does not affect the time within which Defendant O must comply with the production order.

77. In my judgment the Plaintiff was the successful party in both sets of applications. Unless within seven days of the date of this judgment any party gives written notice to the Court that it wishes to be heard on the question of costs, the Defendants in each set of proceedings must therefore

pay the Plaintiff's costs of those proceedings on a standard basis, to be taxed if not agreed.

DATED this 30th day of May, 2014

Hellman J