



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2014: No. O

**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-**

**O**

**Defendant**

## SUPPLEMENTARY RULING

**(In Chambers)**

Date of hearing: 4<sup>th</sup> July 2014

Date of ruling: 18<sup>th</sup> July 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. On 30<sup>th</sup> May 2014 I ruled that pursuant to a letter of request under a TIEA the Defendant should produce copies of various documents to the Plaintiff. I adjourned for further argument the question of who, as between the Plaintiff and the Defendant, should bear the costs of complying with the order. This is a ruling on that question.

## **Jurisdiction**

2. Section 5 of the International Cooperation (Tax Information Exchange Agreements) Act 2005 (“the 2005 Act”) confers jurisdiction on the Court to make a production order. The Court can order the person referred to in the request (a) to deliver to the Minister the information referred to in the request; or alternatively (b) to give the Minister access to such information.
3. Section 6 of the 2005 Act imposes a statutory duty upon a person served with a production order to provide the information sought, provided that it is within his possession or control.
4. The 2005 Act is silent as to who should bear the costs of compliance. The Plaintiff takes the preliminary point that the Act does not make express provision permitting the Court to require an undertaking from the Plaintiff to pay the costs of compliance as a condition of making a production order. Therefore, the Plaintiff submits, the Court has no jurisdiction to require one.
5. I disagree. The Court’s jurisdiction to make an order subject to conditions derives from its inherent jurisdiction as a Superior Court of Record and/or from the broad statutory jurisdiction conferred upon it by section 12 of the Supreme Court Act 1905 (“the 1905 Act”). Moreover, section 19(c) of the 1905 Act provides that the Court can make an interlocutory injunction either unconditionally or upon such terms and conditions as it thinks just. By parity of reasoning the Court has the same powers when making a final injunction. This is relevant because a production order is in substance a

mandatory injunction. I am therefore satisfied that the Court does have jurisdiction to require an undertaking from the Plaintiff as to the costs of compliance.

6. If the Legislature wished to remove the Court's jurisdiction to impose such a requirement it would have to do so in express terms. For example, Schedule 1 of the Criminal Justice (International Co-operation) (Bermuda) Act 1994 deals with Bermudian Evidence for Use Overseas. The Schedule excludes the Court's jurisdiction to make an order for costs by providing at paragraph 6 that no order for costs shall be made in the proceedings.
7. On the subject of costs, the Defendant suggested that in the alternative the Court could make an order that the Plaintiff pay the Defendant's reasonably incurred costs of compliance with the production order pursuant to its costs jurisdiction under Order 62 of the Rules of the Supreme Court 1985 ("the RSC"). I am sceptical as to whether an order with respect to the costs of compliance would fall within the rubric of Order 62, which deals with litigation costs. But in light of my finding in the previous paragraph it is unnecessary to decide the issue.

### **Treaty framework**

8. Neither the TIEA nor the model conventions and official commentaries that provide its legal context form part of Bermuda's domestic law. However, as Bermuda is presumed to legislate in accordance with its treaty obligations, I can take them into account when considering the parties' respective rights and obligations pursuant to a production order made under the 2005 Act. See the Court's ruling of 30<sup>th</sup> May 2014 at para 13 and the cases there cited.
9. Article 10 of the TIEA in question addresses the costs of third parties. It provides:

Incidence of costs incurred in providing assistance (including reasonable costs of third parties and external advisors in connection with litigation or otherwise) shall be agreed by the competent authorities of the Parties.

10. The reference to third parties is unqualified. Thus it includes third party providers of information. However the bracketing of “*third parties*” with “*external advisers*” suggests that what the draftsman had particularly in mind were third parties who were engaged by the requested State, eg translators and interpreters, to help process the request. It goes without saying that the requested State would be liable in contract to pay for their services. It would then be a matter for the Parties to agree as to how those costs were to be borne between them.
11. The Plaintiff submits that Article 10 contemplates that in default of an agreement between the parties to the TIEA neither is responsible for the costs reasonably incurred by a third party in providing assistance.
12. The Defendant submits that Article 10 contemplates that one or other of the Parties to the TIEA will meet the reasonable costs of third parties incurred in providing assistance, but leaves it to the Parties to agree how such costs should be borne between them.
13. In my judgment, Article 10 is neutral as to whether either of the Parties to the TIEA will meet the reasonable costs of third parties incurred in providing assistance. The Article has, of course, no bearing on any contractual arrangements between any such third party and either Party. However, Article 10 provides that the Parties shall agree as to how, if either one of them does become liable for third party costs, those costs shall be borne between them.
14. As to the terms of any such agreement, the Commentary to Article 9 (costs) of the model OECD Agreement on Exchange of Information on Tax Matters states at para 98:

Article 9 allows the Contracting Parties to agree upon the rules regarding the costs of obtaining and providing information in response to a request.

In general, costs that would be incurred in the ordinary course of administering the domestic tax laws of the requested State would normally be expected to be borne by the requested State when such costs are incurred for purposes of responding to a request for information. Such costs would normally cover routine tasks such as obtaining and providing copies of documents.

15. However the Module on General and Legal Aspects of Exchange of Information in the OECD Manual on the Implementation of Exchange of Information Provisions for Tax Purposes provides at para 65:

In practice, several tax information exchange agreements draw a distinction between ordinary and extraordinary costs. They then assign the responsibility to assume ordinary costs to the requested party but require the requesting party to bear any extraordinary costs. “Extraordinary costs” are meant to cover, for instance, .... Costs incurred by third parties from which the requested party has obtained the information (for example bank information).

16. The commentary at para 65 acknowledges the possibility that costs incurred by third parties from which the requested State has obtained the information may be borne by one or other Party to the TIEA. When read in context, what the paragraph contemplates is an agreement between the Parties whereby extraordinary – and not merely run of the mill – costs incurred by third parties, eg because of the large volume of material required to be produced, will be met by the requesting State.
17. The Parties to the TIEA in the present case have entered into a Competent Authority Agreement (“CAA”). Notwithstanding its name, the CAA states at para 1 that it does not create legal obligations in either international law or in the domestic laws of the Parties.
18. The CAA provides at para 8 that the Parties shall reimburse each other for all extraordinary costs incurred in providing information pursuant to the TIEA. These are defined to include third party costs, but limited to reasonable third party costs for engaging, at the request of the requesting

State, experts, interpreters/translators, and non-government counsel. They do not include third party costs of compliance.

19. Para 8 of the CAA covers similar ground, although using different language, to the OECD Model Competent Authority Agreement (“Model CAA”). The Model CAA includes the following provision at para 9:

Where the third-party routine costs are unusually high, such costs will be reimbursed subject to the prior agreement of the competent authority of the applicant Party. It is understood that third party record keepers will generally not charge for the production of documents when such documents are to be obtained in order to respond to a request.

However I derive little assistance from this provision as it is not included in the CAA.

20. I conclude that the TIEA in question, and its contextual framework of model conventions and official commentaries, provide little guidance as to who, as between the Plaintiff and the Defendant, should bear the cost of compliance with the production order.

## **Discussion**

21. The Defendant submits that where a defendant to a production order is an independent third party who was dealing at arm’s length with the taxpayer under investigation then the cost should be borne by the requested State. Whether the requested State can recover its costs from the requesting State is not a matter that need trouble the third party or the Court. This is by analogy with private litigation, where a third party that becomes innocently involved in the wrongdoing of another will not generally be expected to pay any costs which it incurs in assisting the putatively wronged party.
22. For example, where a third party is ordered to disclose documents under the *Norwich Pharmacal* jurisdiction, the applicant will generally be required to give an undertaking to pay the costs incurred by the third party in complying

with the order. Similarly, the applicant for a *Mareva* injunction is generally required to give an undertaking to pay the reasonable costs of anyone other than a respondent which have been incurred as a result of the order, including the costs of finding out whether that person holds any of the respondent's assets.

23. The principle is not confined to private law. In criminal proceedings, the Court has a statutory jurisdiction to make restraint orders which is analogous to its *Mareva* jurisdiction. The standard form of restraint order, including where the restraint order is made pursuant to an external request, includes an undertaking by the prosecutor in analogous terms to the undertaking given by the applicant for a *Mareva* injunction. This is notwithstanding that in Bermuda, as in the pre-Proceeds of Crime Act 2002 legislation in England and Wales, there is no express statutory authority for such a requirement.
24. The Defendant further submits that it falls into the category of independent third parties dealing with taxpayers at arm's length. Having read an affidavit sworn by the Defendant's President and CEO which deals with the issue, for present purposes I accept this submission.
25. The Plaintiff, on the other hand, submits that the cost of compliance should be borne by the Defendant as part of the cost of incorporation in Bermuda and doing business in the global marketplace. It is analogous to the cost of, for example, preparing a suspicious transaction report.
26. It is relevant to look at the comparable circumstance of production orders made in criminal proceedings. They are more closely analogous to production orders made under TIEAs than are *Norwich Pharmacal* orders, *Mareva* injunctions, and restraint orders.
27. There is no settled practice as to the costs of criminal production orders in Bermuda. However in England and Wales where a production order is served on a financial institution the costs of complying with the order would generally be met by the respondent. If the respondent objected, eg because of the large quantity of documents to be produced, it could apply to vary the

order. The court could then, if it thought fit, reduce the scope of the documents to be produced or alternatively require an undertaking from the applicant to meet some or all of the costs of compliance with the order.

28. The Plaintiff further submits that if it were to undertake to meet the Defendant's reasonable costs of complying with the production order this would create a precedent which could have significant budgetary ramifications.

### **Conclusion**

29. The competing policy considerations urged upon me by the parties, while persuasive, are evenly balanced and therefore cancel each other out.
30. Based upon the volume of requests under TIEAs with which the Court has dealt over the past 12 months or so, I find the Plaintiff's budgetary ramifications argument unconvincing.
31. However, it is in my judgment desirable that there should be a common approach to the costs of production orders, whether made in criminal or regulatory proceedings. In the absence of a settled practice in Bermuda, I propose to adopt the practice as to the costs of criminal production orders made in England and Wales.
32. Thus, in the case of production orders made under TIEAs and served on third parties in the financial services industry, the third party respondent should generally bear the costs of compliance with the order.
33. It follows that the Defendant shall bear its costs of complying with the production order made by the Court on 30<sup>th</sup> May 2014.
34. At the hearing on 4<sup>th</sup> July 2014 in which the costs of compliance point was argued, I ordered that the Defendant should pay the costs of the Plaintiff's application for a production order. Unless within seven days of the date of this ruling either party gives written notice to the Court that it wishes to be



heard on the matter, that order will include the Plaintiff's costs of arguing the costs of compliance point.

DATED this 18<sup>th</sup> day of July, 2014

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Hellman J