



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014: No. Ad

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

BETWEEN:-

MINISTER OF FINANCE

Plaintiff

-and-

AD

Defendant

RULING

(In Chambers)

Date of hearing: 15th January 2015

Date of ruling: 27th January 2015

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 and Mr Christian Luthi, Conyers Dill & Pearman Limited, for the Defendant

1. It is a fundamental principle of fairness at common law that a party should have access to the evidence on which the case against him is based and thus an opportunity to comment on it and, if appropriate, challenge it. Thus at common law any document disclosed to the court on an application for a production order, including a production order made under a TIEA, must be disclosed to the party or parties to whom the production order is addressed. See Ministry of Finance v E, F, H and O [2014] Bda LR 54 at paras 15 – 19, applying Al Rawi v Security Service (JUSTICE intervening) [2012] 1 AC 531 UKSC and R (BskyB Ltd) v Central Criminal Court [2012] QB 785 DC.
2. In reliance on that principle, the Defendant Company seeks an order that the Plaintiff provide copies of all the documents placed before the Court on the making of a production order against the Defendant on 30th December 2014 (“the Production Order”). The Production Order, which was made on the papers without a hearing, was made pursuant to section 5 of the International Cooperation (Tax Information Exchange Agreements) Act 2005 (“the 2005 Act”).
3. Section 5(2) of the 2005 Act provides in material part that the Supreme Court may make a production order:

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 ...
4. 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. See Ministry of Finance v E, F, H and O at para 62.

5. The Defendant wishes to obtain copies of the documents which were before the Court when the Production Order was made so that it can satisfy itself that the requirements of section 5 of the 2005 Act have been met.
6. The Plaintiff, however, submits that the Defendant's common law right to copies of the documents has been abrogated by recent amendments to the 2005 Act, which came into force on 8th December 2014. Section 2 of the International Cooperation (Tax Information Exchange Agreements) Amendment Act 2014 ("the 2014 Act") amends section 5 of the principal Act by inserting *inter alia* the following subsections:
 - (6A) A person served with a production order under subsection (1) who seeks information from the Minister pertaining to the production order, must first file an application with the court to review the production order.
 - (6B) Upon the application under subsection (6A) having been filed with the court, the court shall decide whether to grant the person a right of review.
7. I was referred to the Explanatory Memorandum to the 2014 Act. But this merely summarises the provisions of the statute and therefore provides no aid to its construction.
8. The Plaintiff submits that the reference to "*information*" in subsection (6A) includes the documents placed before the Court when the production order is made. He relies upon the broad definition of "*information*" in section 2 of the 2005 Act as meaning:
 - any fact, statement or record in any form whatsoever that is relevant or material to tax administration and enforcement.
9. The Plaintiff submits that under the legislative scheme as amended a party seeking review of a production order must first file an application identifying the grounds of review and the relief sought, ie the clarification, variation or discharge of the order. The Court will review the application

and decide whether to grant the applicant a right of review. The review stage is analogous to the leave stage of an application for judicial review. Its purpose is to screen out applications which are not properly arguable or are merely speculative.

10. It would appear to follow from the Plaintiff's analysis that the Court would have to grant a right of review before ordering the Minister to supply any information to the applicant. Otherwise an applicant could allege that the conditions of the applicable agreement relating to a request were not fulfilled without any evidence that that was the case, simply in order to obtain a copy of the documents which were before the Court when the production order was made. On the Plaintiff's submission, the purpose of the amended statutory scheme is to avoid such fishing expeditions. The grounds of review, he submits, must be confined to grounds which are apparent from the face of the order.
11. Thus an applicant would be unable to seek review on the grounds that the statutory conditions for the making of a production order had not been satisfied because he would not have access to the material which would enable him to assess whether there were grounds to make such an application. However, the Plaintiff submits, applicants can draw comfort from the fact that the request for a production order will have been subject to independent scrutiny by both the Minister when deciding whether to provide assistance to the requesting party and the Court when making the order.
12. This would not, the Plaintiff submits, render the Court's power of review toothless. The applicant could seek clarification of the terms of the order; assert that it did not hold some or all of the documents identified in the order; protest that the terms of the order were too wide or its requirements too onerous and expensive, or that the information requested was too old or too difficult to obtain from third parties; challenge that it was the correct entity to be served; or assert that the information requested could not be relevant to a tax enquiry.

13. The Plaintiff submits that the construction of subsection (6A) of the 2005 Act for which he contends is plainly that intended by the legislature. Otherwise, he asks rhetorically, why bother to enact the subsection?
14. The Defendant disagrees. It relies on the principle that legislation will only be construed as overriding a fundamental right if it does so expressly or by necessary implication. Although I was not referred to any authority on this point, doubtless because it is settled law, I note that in R v Secretary of State, Ex p Simms [2000] 2 AC 115 at 131 F Lord Hoffmann explained the principle thus:

Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

15. By “*fundamental rights*”, Lord Hoffmann meant fundamental human rights at common law, although he acknowledged that when the Human Rights Act 1998 came into force these would be supplemented by the rights set out in the European Convention on Human Rights and Human Freedoms (“the Convention”). He noted that much of the Convention reflected the common law.
16. In (Morgan Grenfell & Co Ltd) v Special Commissioner for Income Tax [2003] 1 AC 563 at para 44 Lord Hobhouse cited the above passage with approval. He noted:

The context in which Lord Hoffmann was speaking was human rights but the principle of statutory construction is not new and has long been applied in relation to the question whether a statute is to be read as having overridden some basic tenet of the common law: Viscountess Rhondda's Claim [1922] 2 AC 339; B (A Minor) v Director of Public Prosecutions [2000] 2 AC 428.

17. As to the meaning of “*necessary implication*”, Lord Hobhouse stated at para 45:

A necessary implication is not the same as a reasonable implication as was pointed out by Lord Hutton in B (A Minor) v Director of Public Prosecutions [2000] 2 AC 428, 481. A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.

18. The Defendant submits that subsection (6A) of the 2005 Act does not remove his fundamental common law right to see the evidence on which the Production Order was based either expressly or by necessary implication. He submits that the subsection should be construed as applying only to information pertaining to a production order other than that which was before the Court when the production order was made, eg any redacted portions of the letter of request. (Redaction of letters of request is commonplace.)
19. I agree with the Defendant’s submissions. Subsection (6A) does not expressly remove the right of a person served with a production order to see the evidence which was before the Court when the production order was made. Neither does the removal of that right necessarily follow from the express provisions of the statute construed in their context. I therefore order that the Plaintiff supply the Defendant with copies of the documents which it seeks.
20. In the circumstances, it is unnecessary for me to decide whether the interpretation of subsection (6A) for which the Plaintiff contends is consistent with the Constitution of Bermuda. Section 6(8) of the Constitution provides:

Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

21. On the face of it, there is a strong case that an obligation to comply with a production order is a civil obligation and that the requirement of a fair hearing includes the right to see the material upon which the production order is based. Although I need not determine these points, which might in other circumstances have been relevant to the construction of subsection (6A), I am constrained to observe that anyone advancing a contrary interpretation of section 6(8) would face a formidable uphill struggle.
22. Either party may address me as to costs, provided that they give the Registry written notice of their intention to do so within seven days of the date of this ruling. Otherwise, on the principle that costs should ordinarily follow the event, the Plaintiff shall pay the Defendant's costs of and incidental to this application, to be taxed on a standard basis if not agreed.

DATED this 27th day of January, 2015

Hellman J