In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014: Nos. Y and Z

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

And in the matter of an application by the Minister of Finance for leave to issue a Writ of Sequestration and for such other order as may seem just to the Court

BETWEEN:-

MINISTER OF FINANCE

Plaintiff

-and-

A COMPANY

Defendant

RULING

(In Chambers)

Date of hearing: 12th November 2014, 21st January 2015, 10th July 2015
Date of ruling: 24th July 2015

Mr David Kessaram, Cox Hallett Wilkinson Limited (at all three hearings), Mr Leighton Rochester, Ministry of Finance and Mr Wayne Brown, Assistant Financial Secretary (at the first two hearings only) for the Plaintiff

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

Introduction

1. By Notices of Motion dated 10th September 2014 and 6th October 2014 the Plaintiff alleged that the Defendant company ("the Company") was in contempt of a court having failed to comply with a Production Order made on 29th May 2014 ("the Order") under the International Cooperation (Tax Information Exchange Agreements) Act 2005 ("the 2005 Act"). To enforce compliance with the Order the Plaintiff sought leave to issue a writ of sequestration against the Company pursuant to Order 45, rule 5 of the Rules of the Supreme Court 1985 ("RSC").

2. As it is common ground that the Order has now been complied with, at least in substantial part, the Plaintiff submits that if the Court finds that there has been a contempt the appropriate penalty would be a fine. The Plaintiff also seeks an order for costs.

3. The Company denies that it has breached the Order, let alone done so contumaciously, and submits that each party should bear its own costs.

4. On 10th July 2015 I found that the Company was in breach of the Order but that, as it had now complied in substantial part with its obligations under the Order, no further action by the Court was required. I ordered that the company pay the Plaintiff's costs of both Notices of Motion on a standard basis, to be taxed if not agreed. These are the reasons for that ruling.

Chronology

5. The Order required the Company to produce certain information relating to three named individuals, to whom I shall refer as A, B and C. The information sought from each individual was *mutatis mutandis* the same:

> 1. Copies of all documents containing any insurance policies held by Mr [] in the Company for the period 1 January 2010 to 31 December 2012, including but not restricted to policies number [] and [] [six policies]. These should include but not be restricted to agreements, statements, any instructions, memos, emails giving specific instructions in respect of the affairs made, distribution of assets or income arising from assets held by the insurance policies.
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> 2. Copies of the original Policy Schedules and related documents that show when (date and year) Mr [] first signed or bought his insurances with Policy number [] and [] and/or first signed or bought his insurances with any other policy numbers.

6. The information was to be produced on or before 26th June 2014, ie within 28 days. The Order stated that the Company was entitled to apply to the Court to review, vary or discharge the Order, and that any such application should be made within that 28 day period.

7. The Company provided documents in purported compliance with the Order by cover of letters dated 24th June 2014 and 19th August 2014. The Company took the position that, having done so, it had complied fully with the terms of the Order. The Plaintiff disagreed. There was correspondence between the parties, but this failed to resolve the impasse.

8. On 10th September 2014 the Plaintiff filed a Notice of Motion seeking leave to issue a writ of sequestration against the property of the Company by reason of its alleged contempt in, it was said, wilfully disobeying the terms of the Order.

9. On 22nd September 2014 the Requesting Tax Authority ("RTA") wrote to the Plaintiff ("the RTA Letter"), having analysed the documents provided by the Company, to identify outstanding areas where material was still sought under the request which had issued in the Order. Some of this material was covered by the existing Notice of Motion, but not all. Consequently, on 6th October 2014 the Plaintiff filed a further Notice of Motion seeking leave to apply for sequestration of the Company's assets for its allegedly contumelious failure to provide the material said to be required by the Order and identified in the RTA letter.

10. On 12th November 2014 the applications for leave to issue a writ of sequestration came on for hearing. The Court noted the statement on affidavit by Mr K that he "*wished to comply with all orders of the Court*" and adjourned the hearing upon an undertaking by the Company to provide the following documents and information as agreed by the parties and recorded in a Schedule to the order adjourning the hearing ("the Adjournment Order"):

    (1) An affidavit of Mr K setting out the fact that the original policies no longer existed.

    (2) Letters to all banks which had held assets for the relevant tax payers in the form agreed, to be sent on 13th November 2014 to those institutions.

    (3) The custodian agreements for current banks in respect of tax payers, which might include custodian agreements prior to 2010 where appropriate.

    (4) Details concerning unquoted investments as per the request in the RTA Letter.

11. The Company wrote to the banks as required by the Adjournment Order and in November/December 2014, as a result of that Order, made further

disclosure to the Plaintiff of three tranches of documents. The Plaintiff had concerns about the adequacy of the further disclosure, which were expressed in correspondence to the Company. The matter returned to court on 21st January 2015, when the Court ordered ("the Second Adjournment Order") that:

(1) The Company confirm to the Plaintiff in writing within 7 days the dates on which each of certain policies referred to in the RTA Letter came into being and identify the documents produced to the Plaintiff which refer to the date of inception of the said policies.

(2) The Company cause letters to be sent to its custodian banks (to be copied to the Plaintiff or its attorneys) before 1st February 2015 requesting in relation to each transaction identified in the RTA Letter (in respect of funds transferred to the custodian account) the identity of the person from whom such funds were received and (in respect of funds transferred out of the custodian account) the identity of the person to whom such funds were sent; and stating in respect of each transaction sent to or received from a bank (a) the name of the bank; (b) its address; (c) the name of the account holder, and (d) the account number.

(3) The Plaintiff verify the statement in the RTA Letter that the documents produced by the Company pursuant to the Order do not contain statements relating to certain specified accounts in the name of Mr [] and communicate its findings to the Company.

12. The Company caused letters to be sent to its custodian banks as required by the Second Adjournment Order and on 28th January 2015, pursuant thereto, provided further disclosure to the Plaintiff. I am satisfied that the Company thereby discharged, at least in substantial part, its obligations under the Order.

Evidence

13. I have had the benefit of reading three affidavits from Wayne L Brown, Assistant Financial Secretary for the Ministry of Finance, on behalf of the Plaintiff, and two affidavits from Mr. K, President and Chief Executive Officer of the Company, on the Company's behalf. These comprised the evidence that was before the Court.

Alleged contempts

14. By the Notice of Motion dated 10th September 2014 the Plaintiff alleged that the Company had breached the Order by:

    (1) Failing to produce by 26th June 2014 the annual statements for the period 2010 to 2012 for the six insurance policies identified in the Order;

    (2) Producing only those documents that the Company itself considered to be relevant rather than "*all documents*" as commanded by the Order and specifically failing to produce certain documents specified in a letter from the Plaintiff's attorneys dated 13th August 2014 and the documents related to quoted and unquoted investments under the policies; and

    (3) Failing to produce any of the documents underlying the changes in the yields in the insurance policies which are the subject of the Order and the monies passing through each policy including but not limited to statements of transactions, the identity of the investments or assets thereunder and the source of the funds.

15. By the Notice of Motion dated 6th October 2014 the Plaintiff alleged that the Company had breached the Order by:

(1) Failing to produce the "*related documents that show (date and year)*" when the insurances were signed /bought as required by the Order.

16. The Company did not produce annual statements for the six insurance policies identified in the Order until 19th August 2014, some 54 days after the date specified in the Order for the production of documents. The Plaintiff alleged that as of the dates when the Notices of Motion were issued the other breaches of the Order were ongoing.

The law

17. The principles applicable to a finding of contempt were summarised by this Court in Joliet 2010 Ltd v Goji Ltd [2012] Bda LR 75 at para 13. The requirements for an order for committal apply by parity of reasoning to an order for leave to issue a writ of sequestration in aid of enforcement of an order.

> "*i. For a contempt to be established it has to be shown that the conduct which breached the undertaking was intentional or deliberate and that the alleged contemnor had knowledge of the facts which made his conduct a breach. It is unnecessary to establish that the alleged contemnor appreciated that his conduct was a breach of the undertaking. See the decision of the High Court of England and Wales in Marketmaker Technology (Beijing) Co Ltd v CMC Group Plc [2009] EWHC 1445 at paragraph 14.*
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> *ii. No order or undertaking will be enforced by committal unless its terms are clear, certain and unambiguous. See Marketmaker Technology (Beijing) Co Ltd v CMC Group Plc at paragraph 18.*
>
> *iii. An order made by a court of competent jurisdiction must be obeyed unless and until it has been set aside by the court. See the decision pf the Privy Council in Isaacs v Robertson [1985] 1 AC 97 at 101 G – H.*
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> *iv. The standard of proof required at committal proceedings is the criminal standard, ie beyond a reasonable doubt. See the decision of the Court of Appeal of England and Wales in Dean v Dean [1987] 1 FLR 517.*"

Company's response

18. In his first affidavit, dated 13th October 2014, Mr K, while stating that the Company wished to comply with the Order, asserted that it had already done so. The disclosure by the Company after 12th November 2014 was subject to this caveat.

19. Mr K made three points. First, he appeared to interpret the reference to documents in the Order to mean hard copy documents. However the Company kept most of its records in the form of an electronic database and not as hard copies. Whereas the Company produced promptly copies of all the hard copy documents in its files, it had not produced all the information in its electronic database because Mr K did not believe that this was what the Order required.

20. Explaining the Company's position to the Court, its attorney, Mr Elkinson, drew a distinction between documentation and information. He submitted that whereas the Company accepted that the Order covered documents in both hard copy and electronic format, the Company had not understood it to cover information which, while held electronically, had not been included in a discrete document or which had been included in an electronic document but not one which had been retained. In other words, he submitted, the Order did not require the Company to review its electronic records to create a fresh document or reconstruct an old one of which the Company no longer held a copy.

21. For example, Mr K stated that every year the Company's software generates a statement for each of its policies, which is sent out to the respective policyholders, but that no copy is kept on file. At the Plaintiff's request, the Company reconstructed this information for the six named policies over the relevant period and supplied a copy to the Plaintiff. But Mr K stated that in so doing the Company went beyond what he understood were the requirements of the Order.

22. Second, although his affidavit was not entirely clear upon this point, Mr K appeared to take the view that the Company was only required to produce copies of documents within its possession, and not those which, while not in its possession, were within its control. Detailed information about deposits and withdrawals in relation to the policies would fall into the latter category, as the Company does not trade or invest assets, and would be held by the Company's custodian banks.

23. Third, and irrespective of a literal reading of the Order, Mr K had limited the Company's disclosure to material which he considered relevant, based on his understanding of the Swedish tax system. This understanding was based, in part at least, on an opinion which had been supplied to him by the Swedish law firm acting for A, B and C in their disputes with the RTA. He offered to meet with members of the Treaty Unit to explain the Company's position. Mr Elkinson submitted that Mr K should not have been put in the position of having to form a view as to what documents were covered by the Order. He submitted that, by analogy with an incoming letter of request in relation to mainstream civil litigation, the Order should only have required the production of particular documents and that these should have specified. He relied on Panayiotou v Sony Music Ltd [1994] Ch D 142 EWCA at 151 G – 152 B.

Findings

24. The Company's response was misconceived. Under RSC Order 24, a "*document*" includes information stored in the database of a computer which is capable of being retrieved and converted into readable form. See Derby & Co Ltd v Weldon (No. 9) [1991] WLR 652, Ch D, *per* Vinelott J at 657F to 658C. By parity of reasoning, unless the context provides otherwise, "*document*" within the meaning of a production order under the 2005 Act is to be construed equally broadly.

25. This approach is consistent both with the breadth of this particular Order and the policy underpinning the 2005 Act. Although the Act does not define "*document*" it defines "*information*" at section 2 as meaning: "*any fact, statement or record in any form whatever that is relevant or material to tax administration and enforcement*". The function of a production order, as stated in section 5(2), is to deliver to the Minister the information referred to in the request or to give the Minister access to such information.

26. Section 6(1) of the 2005 Act requires a person on whom a production order has been served under section 5 to provide the information specified in the production order to the Minister within the period specified in the order. However section 6(2) provides that a person is not required to comply with a request for information if the information is not within the person's possession or control. From section 6(2) I infer the clear legislative intent that a person is required to comply with a request for information that is within that person's possession or control.

27. 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).

28. The definition of "*information*" in the 2005 Act echoes the definition of "*information*" in Article 4 of the model Agreement of Information on Tax Matters ("the Model Agreement") developed by the OECD Global Forum on Effective Exchange of Information as meaning "*any fact, statement or record in any form whatever*". The Commentary to the Model Agreement notes that *"[t]he definition is very broad*".

29. Article 5(4) of the Model Agreement provides:

> "*Each contracting Party shall ensure that its competent authorities for the purposes specified in Article 1 of the Agreement, have the authority to obtain and provide upon request:*
>
> *a) information held by banks, other financial institutions, and any person acting in an agency or fiduciary capacity including nominees and trustees;*
>
> b) *information regarding the ownership of companies, partnerships, trusts, foundations, "Anstalten" and other persons, including … ownership information on all such persons in an ownership chain; in the case of trusts, information on settlors, trustees and beneficiaries; and in the case of foundations, information on founders, members of the foundation council and beneficiaries.*"

30. The OECD has also produced a Model Template for requests for information under TIEAs. Under section 11, the Requesting State is asked to indicate the tax purpose for which the information is requested. The options given are: determination, assessment and collection of taxes; recovery and enforcement of tax claims; investigation or prosecution of tax matters; and other.

31. Clearly, therefore, the scope of the information which may be requested under a TIEA and made the subject of a production order under the 2005 Act is much broader than particular documents required for the purpose of evidence in a judicial proceeding.

32. In that sense, production orders issued under the 2005 Act are analogous to production orders issued under section 37 of the Proceeds of Crime Act 1997 ("POCA"). These may be sought "*in relation to particular material or material of a particular description*" for various specified investigatory purposes and are often made in broad terms. (The scope of production orders under the 2005 Act may be even broader as there is no requirement of particularity in the wording of that Act.)

33. Eg in R v Southwark Crown Court, Ex p Bowles [1998] AC 641 the House of Lords considered a production order made under section 93H of the

Criminal Justice Act 1988, which was analogous to section 37 of POCA. The order required that the recipient, who was the accountant for the persons under investigation, should produce:

"*all files, documents and accounts and other records used in the ordinary course of business [howsoever recorded] … paid cheques, inter-account transfers, telegraphic transfers and correspondence … in relation to her dealings with A.B.M. and any other material relating to [Mr. or Mrs.] Peaty {ie the persons under investigation.}*"

34. The House of Lords dismissed an appeal against a decision quashing the production order. This was because the order had been obtained for the purpose of investigating whether an offence had been committed and not, as required by section 93H, for the dominant purpose of investigating the proceeds of criminal conduct. However for present purposes what is material is that their Lordships cast no aspersion on the breadth of the production order.

35. In his affidavit Mr K stated he was advised that a production order was more closely related to an order for specific disclosure under Order 24, rule 7 than an order for general discovery under Order 24, rule 1. In a sense it is, but the requirement to produce documents within a person's possession, custody or power applies equally to orders made under both rules. In point of fact, the production order was not made pursuant to Order 24 but to section 5 of the 2005 Act and, as noted above, the ambit of production orders under that section may be very broad.

36. As to relevance, that is a matter for the Court, not the Company or the legal advisers of A, B and C. If the Court was not satisfied that the documents sought in the Order were relevant it would not have made the Order in those terms. If the Company wished to persuade the Court that some of the documents sought were irrelevant or that the ambit of the Order was excessively burdensome then the Company could have applied to the Court to review, vary or discharge the Order. It should not have sought to rewrite the Order unilaterally, which is in effect what it did. I accept that Mr K's

offer to meet with the Treaty Unit, which they declined, showed willingness on his part to engage with the terms of Order. But it was no substitute for compliance with its terms.

37. I am satisfied that the terms of the Order, although broad, were clear, certain and unambiguous. However, irrespective of the express terms of a court order, it is always open to a party to apply to the Court for guidance as to the meaning of the order and what must be done to comply with its terms. Once it became apparent that there was a disagreement between the parties as to what was required by this Order, it is unfortunate that neither one sought the guidance of the Court. This would have been a quicker, cheaper, and more convenient way to clarify the issue than an application for leave to issue a writ of sequestration. It is not clear to me that such an application would have counted as an application for the review of the Order. But even if it would, under RSC Order 3, rule 5 the Court had power to extend the 28 day period within which the Company should have applied to the Court for such review.

38. In the premises, I am satisfied that the Order required the Company to produce copies of all the documents identified in both Notices of Motion and that the Plaintiff made it clear to the Company, both in correspondence and through the Notices of Motion, that it required those documents. I am therefore satisfied that the Company was in breach of the Order in that it did not produce the required documents within 28 days of the date of the Order. Indeed 420 pages of documents, which formed the bulk of the documents identified in the Order, were not produced until after the hearing on 12th November 2014 – and some of them not until 28th January 2015. Most of the 420 pages were statements and transaction advices held by custodian banks and were at all material times under the Company's control.

39. As the Order has now, belatedly, been complied with, at least in substantial part, I am satisfied that the interests of justice do not require me to go on to consider whether the Plaintiff has proved to the criminal standard that the

breaches were deliberate and hence whether the Company has committed a contempt. However I am satisfied that the Company's approach to its obligations under the Order was, at the very least, obtuse. Obtaining compliance with the Order was like pulling teeth. It is in the public interest that Bermuda complies with its obligations under TIEAs in a timely manner, both to assist requesting States and to maintain and enhance its reputation in the sphere of international tax enforcement. The Company's laggardly approach tended to frustrate this important public interest.

40. The Plaintiff has in "real life" terms been the successful party in that it has established that the Company was in breach of the Order. I am satisfied that it was necessary for the Plaintiff to seek leave to issue sequestration proceedings in order to obtain compliance with the Order. It is for that reason that I have ordered that the Company pay the Plaintiff's costs of both Notices of Motion, to be taxed on the standard basis if not agreed. I have made no further order on the Notices of Motion.

DATED this 24th day of July, 2015

Hellman J