In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. AA193

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 REQUESTING COUNTRY, KINGDOM OF SWEDEN

BETWEEN:

THE MINISTRY OF FINANCE

Plaintiff

-and-

DEF LTD

Respondents

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr Jeffrey Elkinson, Conyers Dill & Pearman, for the Minister of Finance**
Mr Jordan Knight, Appleby (Bermuda) Limited, for the Respondents

Date of Hearing: **19 July 2019**

Date of Ruling: **31 July 2019**

RULING

Introduction

1. By an ex parte Production Order dated 15 April 2019 the Court, pursuant to section 5(2) of the International Cooperation (Tax Information Exchange

Agreements) Act 2005 ("the 2005 Act"), ordered that DEF Ltd ("the Respondents") produce the following information to the Minister of Finance ("the Minister"):

(1) In relation to the affairs of the Respondents for the years 2015 – 2018:
   (a) Annual Financial Statements;
   (b) Trial Balances and/or balance sheets and income statements from the accounts;
   (c) Complete general ledgers from the accounts ;
   (d) Copies of 6 numbered accounts of the Respondents for the calendar years 2015, 2016, 2017 and 2018 ;
   (e) Any other bank accounts not mentioned above that are associated with the Respondents; and
   (f) Bank account information for a numbered account relating to Northern Trust International Banking Corporation.

(2) In relation to the affairs of AHYF Ltd:
   (a) The Annual Financial Statements for the period 2014 – 2016;
   (b) Trial Balances and/or balance sheets and income statements from the accounts for the period 2014 – 2016;
   (c) Complete general ledgers from the accounts for the period 2015 – 2016; and
   (d) Copies of statements for bank accounts for the period 2015 – 2016.

Relevant provisions of the 2005 Act

2. The Preamble to the 2005 Act states that it is expedient to make general provision for the implementation of a tax information exchange 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 agreements.

3. 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 and to deliver to the Minister the information referred to in the request.

4. 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.

5. 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*.

6. 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.

7. Section 5(6A) provides that a person served with the 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.

8. 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.

9. 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 or authority in its own jurisdiction for the purposes of the administration and enforcement of its tax laws; or (ii) a person employed or authorised by the government of the requesting party to oversee data protection.

Historical position under the 2005 Act

10. In order to appreciate the provisions of section 5(6), dealing with the ability of the aggrieved party to obtain full disclosure of the material reviewed by the Supreme Court when making the ex parte Production Order, it is instructive to understand the historical context and rationale of the current provisions.

11. As noted by Hellman J in *Ministry of Finance v E,F,H,O* [2014] Bda LR 54, [14], the extent to which the Minister is required to disclose a request to the person required to provide information under it as being a historic battleground. He referred to 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 in *Minister of Finance v Bunge Ltd* [2013] Bda LR 83. It is evident that there have been a number of legislative changes to section 5(6) of the 2005 Act all designed to prevent disclosure of documentary material sought only, as Mr Elkinson put it, for "fishing" purposes.

12. Prior to December 2013, the legislative framework under the 2005 Act provided that the Minister was the competent authority for Bermuda under the relevant agreements and that the Minister may provide assistance to any requesting party according to the terms of the agreement with that party (section 3). It was the Minister who could, by notice in writing served on any person in Bermuda, require the person to provide any information that the Minister may require with respect to a request for assistance by a requesting party. The Supreme Court played no role at this stage in issuing Production Orders.

13. In the *Minister of Finance v Bunge Ltd* [2013] Bda LR, the Court of Appeal considered the obligations Minister to provide disclosure on whom the notice to produce was served and stated the position to be as follows:

> *" i. 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;

ii. 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;"

14. Following the *Bunge* case, the 2005 Act was amended and the amendments came into force on 12 December 2013 under which the Financial Secretary or Assistant Financial Secretary may make an application for a Production Order to the Supreme 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 aside or vary its terms. The amended provisions were in the following terms:

"(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."

15. In *Ministry of Finance v E, F, H, O* [2014] Bda LR 54, Hellman J held that under the amended provisions any document disclosed to the court on the hearing of an application for a Production Order must also be disclosed to other parties. He relied upon the Divisional Court's decision 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. Following this decision section 5 of the 2005 Act was further amended, with effect from 8 December 2014 by the addition of the following:

"(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"

17. The efficacy of these provisions was tested in the *Minister of Finance v AD* [2015] Bda LR 52, before Hellman J and the Court of Appeal and both courts rejected the submission that the right of a person served with a Production Order to see the evidence which was before the court had been removed. The reasoning of both courts is set out in the judgment of Kay JA in the following passages:

"12. Hellman J rejected these submissions. He characterised the right to disclosure of the material deployed by the Minister in support of the ex parte application as a "fundamental right" of the kind referred to by Lord Hoffmann in R v Secretary of State for the Home Department, ex parte Simms [2000] 2 AC 115, 131. As such, it could only be removed by express language or necessary implication (which is not the same as reasonable implication: Morgan Grenfell & Co Ltd v Special Commissioners for Income Tax [2003] 1 AC 563, per Lord Hobhouse at paragraph 44). He added: "Subsection (6A) does not expressly remove the right of a person served with a Production Order to see the evidence which as 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 in their context.

15. Like Hellman J, I consider that a person who is served with an order which has been obtained ex parte has a common law right, properly described as fundamental, to disclosure of the material placed before the judge on the ex parte application. It is important to keep in mind the

context of the present case. A Production Order is the result of an invocation of the judicial process which, at the behest of a public authority, imposes a burden upon the person to be served. He may be a person with a potential tax liability in another jurisdiction but this is not always the case. The order may be directed to, say, a bank, a professional adviser or a financial intermediary in relation to the tax affairs of a customer or client. To the extent that the case for the Minister goes so far as to contemplate that the subject of an ex parte order may be fixed with its burden, reinforced by criminal sanctions, without being assured of a right of review and without being permitted to see the material upon which it was based, it is highly exceptional. Moreover, there is no overriding public interest such as national security, which might, in exceptional circumstances, justify a departure from the normal fundamentals of fairness.

17. All this leads me to the view that this case concerns the possible abrogation of a fundamental common law right for a reason which may be understandable but which is not especially compelling. The central question then is whether the statutory language introduced by subsection (6A), clearly and expressly, or by necessary implication, has the effect for which the Minister contends.

18. In my judgment, it does not. The correlative of the fundamental right to disclosure is the obligation to disclose. Having obtained an ex parte order, the Minister is under a duty at common law to disclose the material upon which his application was based. The legislature did not make it "crystal clear" that the fundamental right was being abrogated: Jackson v Attorney General [2006] 1 AC 262, paragraph 159, per Lady Hale, and Evans v Attorney General [2015] UKSC 21, paragraph 56, per Lord Neuberger. Subsection (6A) is concerned with the situation where the person who has been served with a Production Order "seeks information from the Minister". It does not expressly abrogate the common law duty to disclose the material upon which the ex parte application was based. It is

possible, and certainly not fanciful, that a person upon whom a Production Order has been served will seek information over and above that upon which the ex parte application was based. One possibility, which was contemplated by Hellman J, is information relating to redacted parts of documents which accompanied the ex parte application. As Mr Elkinson points out, it is quite possible that a person upon whom a Production Order is served will seek information about oral statements or about documents not exhibited to the filed documents, but expressly referred to in them. Subsection (6A) can properly be applied to such matters without extending to the abrogation of the fundamental right to disclosure of the filed documents."

18. It will be seen from above passage in the judgment of Kay JA [18] that the Court of Appeal took the view that the wording of subsections (6A) and (6B) did not make it "crystal clear" that the common law fundamental right was being abrogated. Both Hellman J and the Court of Appeal accepted that even common law fundamental rights can be abrogated provided that it is "crystal clear" from the language used that that is indeed the intention of the legislature. Lord Hoffmann referred to this aspect in his speech in *ex parte Simms* [2000] 2 AC 115, at 131:

"Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. 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. In this way the courts of the United Kingdom,

though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

19. Mr Knight for the Respondents submits that the issues for the court under section 5(6A) and (6B) at this preliminary leave stage of the following:

    (i) Has the party seeking disclosure of the ex parte documents made an application under section 5(6) for review of that order?
    (ii) If so, then, pursuant to section 5(6B), whether the Court should grant a right of review of that order?
    (iii) Where leave for review is granted, the next question is, in exercising its broad discretion, is it appropriate that the ex parte document (or any part of them) should be disclosed to the recipient of the Production Order?

20. Mr Elkinson for the Minister argues that the practical effect of the amended section 5(6B) is that the Respondents have to make a prima facie case for review before the Court can consider whether, exercising its discretion, it is appropriate to order disclosure of the material before the court at the ex parte stage. He argues that the Court must have before it something factual from the Respondents that gives rise to an arguable case that there is some material deficiencies in the application before the court.

21. It will be seen that it is common ground between the parties that before the court can consider making an order of disclosure of the ex parte material the Court must conclude under section 5(6B) that this is a case where the affected party should be given a right of review. To this extent it does appear that the common law fundamental right of a party to obtain all the material seen by the court at the stage of making an ex parte order has been modified.

22. A related issue which arises for consideration is the test which the court should apply in considering whether it should grant the right of the under section 5(6B).

The subsection itself does not expressly set out the test which should be applied in granting such a right of review.

23. Mr Knight argues that the test should be no higher than "*stateabilty"* or *"arguability*". He relies upon the decision of the Irish Supreme Court in *Hugh Governey v The Financial Services Ombudsman* [2015] 2 IR 616, a case concerning the absence of express statutory criteria for appeal in circumstances where a fundamental right had been restricted by Parliament. In that case the Irish Supreme Court accepted the submission presently advanced by Mr Knight:

> *"3.3 On the first question, the argument put forward on behalf of Mr. Governey was that leave should be granted where the potential appellant establishes a stateable or arguable basis for an appeal. The counter argument, advanced by both the F.S.O. and Anglo, was to the effect that it must be taken to have been implied, by the fact that the Oireachtas chose to require leave before an appeal could be brought to this Court, that some criteria above and beyond stateability or arguability must be established.*
>
> *3.6 In the light of the general principles applicable to the construction of legislative provisions which restrict or exclude a right of appeal otherwise constitutionally provided, I am satisfied that a statutory provision which provides for appeal only on leave, but which is silent as to the leave criteria, must be interpreted as meaning that leave should be granted provided that a stateable basis for appeal has been established. No higher criteria should be implied in the absence of express provision.*
>
> *3.7 In addition, in the context of this case, it must also be noted that the stateable basis for the appeal sought to be brought must, of course, be a stateable basis within the scope of the type of appeal allowed. As this case can only involve an appeal on a point of law, it follows that it is necessary for Mr. Governey to establish that he has a stateable appeal on a point of law. If the scope of appeal permitted under the 1942 Act were wider, then,*

of course, the type of appeal which might meet a stateabillity test might itself be wider."

24. I accept 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. This test is consistent with the test applied in relation to applications for judicial review.

Application of the test to the alleged grounds for review

25. The totality of the grounds relied upon for seeking the right of review under section 5(6B) as set out in paragraph of the First Affirmation of Marcus Jibreus and those grounds are as follows:

> *"Without knowing what information has or has not been provided to the Court by the Minister's application, the Entities are unable to properly seek legal advice and ascertain potential grounds for seeking orders to clarify, vary or set aside the Production Order. However, even on its face the Production Order raises significant concerns. For instance, the Entities have already given extensive disclosure to the Swedish authorities of their financial information. The disclosures sought in the Production Order seems to include areas already covered by earlier disclosures. This causes us to be concerned as to whether the Minister has failed to disclose material information to the Court provided by the Entities. It is impossible to know the extent of this, or indeed whether there are any other substantive grounds for review, without sight of the ex parte application documents".*

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. 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 (Paragraph 9 above). Accordingly, this particular complaint can no longer be used as a ground for advancing the argument that the party should be granted the right of review under section 5(6B).

27. The only factual complaint made is that, *"the Entities have already given extensive disclosure to the Swedish authorities of their financial information. The disclosures 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 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. In the circumstances, I do not consider that this ground advances the Respondents' application for the grant of a right of review.

29. In the end I have come to the view that no sufficient grounds are advanced on which the Court may reasonably conclude that the Respondents have established an arguable ground in support of their application that they should be granted the right of review. Accordingly, I refuse the Respondents' application that they be granted the right of review under section 5(6B) and their application of disclosure of documents used at the ex parte hearing under section 5(6A).

30. I shall hear the parties in relation to the issue of costs.

Dated 31 July 2019

NARINDER K HARGUN
CHIEF JUSTICE