IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SEVICES DIVISION

FSD. CAUSE NO. 196 OF 2015 ASCJ
FSD. CAUSE NO. 197 OF 2015 ASCJ
FSD. CAUSE NO. 198 OF 2015 ASCJ
FSD. CAUSE NO. 199 OF 2015 ASCJ

IN THE MATTER OF FOUR CONSOLIDATED APPLICATIONS UNDER THE CONFIDENTIAL RELATIONSHIPS (PRESERVATION) LAW (the "CR(P)L").

AND IN THE MATTER OF THE PROCEEDINGS PENDING IN THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

BETWEEN	**UNITED STATES OF AMERICA**	**PLAINTIFF**
AND	**VERNA CHERYL WOMACK**	**DEFENDANT**

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 23rd – 24TH FEBRUARY 2016 AND 8TH APRIL 2016

APPEARANCES: Mr. James Austin Smith of Campbells, for the Applicant in each Cause.

Mr. Ian Huskisson and Mrs. Charmaine Richter of Travers Thorpe Alberga for Ms. Cheryl Womack, Respondent.

Ms. Jacqueline Wilson, Solicitor General and Ms. Reshma Sharma for the Attorney General as Amicus Curiae.

Ms. Toyin Salako, Crown Counsel, for the Director of Public Prosecutions as Amicus Curiae.

Applications under Section 4 of the Confidential Relationships (Preservation) Law (the"CR(P)L") for directions for the giving of evidence in foreign criminal tax proceedings - whether such applications are to be allowed given the existence of treaty arrangements specifically for the obtaining of such evidence – examination of the inter-relationships between the CR(P)L, the Tax Information Exchange Treaty and Law and other legislative schemes in pari materia.

JUDGMENT

1. These are consolidated applications by which four Applicants seek directions under section 4 of the Confidential Relationships (Preservation) Law (the "CR(P)L"), respectively to allow each of them to give evidence in proceedings now pending before the United States District Court for the Western District of Missouri ("the Missouri Court").

2. The Applicants have been informed that criminal tax proceedings have been commenced by the United States Department of Justice in the Missouri Court against the defendant Ms. Womack, a United States citizen and a former client of the Applicants (as will be explained below), and in which the indictment alleges, among other things[1], that she:

> *"...opened a series of bank accounts and organized a series of nominee companies and trusts in the Cayman Islands to conceal a portion of her income from the IRS. At all times, WOMACK exercised control over the nominee companies and trusts, and they were maintained for her financial benefit".*

3. The Applicants are current or former officers or employees of Willis Management (Cayman) ("Willis Cayman") Ltd, a professional services firm with affiliates in other countries and specializing in captive insurance management. Ms. Womack, either in person or through entities which she controlled, was provided with professional fiduciary services by the Applicants, through Willis Cayman. It was in the course of that relationship that the Applicants came into possession of confidential information

[1] In this 10 count indictment the other 9 counts allege offences of lying under oath to the U.S. Tax Authorities.

about Ms. Womack's affairs: the information that would inform the evidence which they now intend to give.

4. The information having been acquired in the course of a professional confidential relationship, it is protected from unauthorized disclosure by the CR(P)L, which prescribes a criminal sanction for breach.

5. In the absence of authorization by way of Ms. Womack's consent as their "principal" as she is deemed to be by the CR(P)L[2], the Applicants have been advised to seek authorization by way of directions of the Court under section 4. Hence these applications.

6. The Applicants do not dispute the confidentiality of the information nor the existence of the duties of confidence owed to Ms. Womack. Rather, despite those duties and in order to ground their applications, they assert variously:

   (1) In the case of Mr. Ryan Ogden: that he now resides in the United States and having been served with a subpoena to testify before the Missouri Court, would be liable to penalty if he fails to comply and so is bound to comply. Further, that as he would be acting in breach of the CR(P)L if he testifies without Ms. Womack's consent and without directions from this Court allowing him to do so, he is obliged to make his application under section 4 of the CR(P)L before complying with the subpoena.

   (2) In the case of Mr. Timothy Byrne: that while he now resides in Ireland and so is not amenable to compulsion by the Missouri Court, he intends nonetheless to testify before it and so can properly bring his application under section 4 of the

[2] By Section 2 of the CR(P)L, "principal" means " a person who has imparted to another confidential information in the course of the transaction of business of a professional nature".

CR(P)L for directions. In Ireland he is employed with another Willis Group affiliate and so he "*consider(s) it as part of Willis' obligations as a good corporate citizen to assist the U.S. Authorities by providing evidence as a witness where there are allegations of criminal offences*".

(3) In the case of Mr. James Owen who continues to reside and work for Willis Cayman in the Cayman Islands; he points to the fact that he has already been required by the Cayman Islands Tax Information Authority Law (the "TIAL") by notice issued by the TIAL Authority, to disclose documentary information about Ms. Womack's affairs and has already done so. Further, that as he has been made aware that he is needed by the U.S. Authorities as a witness in the proceedings against Ms. Womack, he too regards it as part of Willis' "*good corporate citizen obligations*" to assist the U.S. Authorities by giving evidence;

(4) In the case of Mr. Stephen Gray who also continues to reside in and work here for Willis Cayman; he too has already disclosed information as required by the TIAL Authority and has been informed that he is needed by the U.S. Authorities as a witness in the proceedings against Ms. Womack and intends to comply.

7. That being the background to these four applications, it must be acknowledged that the Applicants do have standing to bring them in the purely technical sense under section 4 of the CR(P)L which provides, in parts relevant for present purposes, as follows:

> *"4. (1) Whenever a person intends or is required to give in evidence in, or in connection with, any proceeding being tried, inquired into or determined by any court, tribunal or other authority (whether within or without the Islands) any confidential*

information within the meaning of this Law, he shall before so doing apply for directions and any adjournment necessary for that purpose may be granted.

(2) ....

(3) Upon hearing an application under subsection (2), a Judge shall direct-

(a) that the evidence be given;
(b) that the evidence shall not be given; or
(c) that the evidence be given subject to conditions which he may specify whereby the confidentiality of the information is safeguarded.

(4) In order to safeguard the confidentiality of a statement, answer or testimony ordered to be given under subsection (3) (c), a Judge may order-

(a) divulgence of the statement, answer or testimony to be restricted to certain named persons;

(b) evidence to be taken in camera; and

(c) reference to the names, addresses and descriptions of any particular persons to be by alphabetical letters, numbers or symbols representing such persons the key to which shall be restricted to persons named by him.

(5) Every person receiving confidential information by operation of subsection (2) is as fully bound by this Law as if such information had been entrusted to him in confidence by a principal.

(6) In considering what order to make under this section, a Judge shall have regard to-

(a) whether such order would operate as a denial of the rights of any person in the enforcement of a just claim;

(b) ....

(c) in any criminal case, the requirements of the interests of justice."

8. Other provisions of the CR(P)L are also relevant to these applications as follows:

> "By section 2 "*confidential information*" includes *"information concerning any property which the recipient thereof is not, otherwise than in the normal course of business, authorized by the principal to divulge".*

9. As noted above, Ms. Womack as the Applicants' principal, has not authorized the divulgence of information concerning any property which is the subject of her fiduciary relationship with the Applicants nor, as also contemplated by this definition, is there any basis for finding that the Applicants are authorized to disclose it pursuant to section 3(2)(b)(i) "*in the normal course of business*", (as to which see further below).

10. There is some suggestion in Mr. Austin-Smith's written arguments that the Applicants, as employees of Willis, might be availed of this exemption but this was not explained and there is no application made by Willis itself. I simply note in passing that were the Applicants so authorized, there would be no need for these applications under section 4.

11. For a proper understanding of how the CRP(L) operates some further provisions of section 3 must be noted, as follows:

> *"3 (1) Subject to subsection (2), this Law has application to all confidential information with respect to business of a professional nature which arises in or is brought into the Islands and to all persons coming into possession of such*

information at any time thereafter whether they be within the jurisdiction or thereout.

(2) This Law has no application to the seeking, divulging or obtaining of confidential information -

(a) in compliance with the directions of the Grand Court under section 4;

(b) by or to –

(i) any professional person acting in the normal course of business or with the consent, express or implied, of the relevant principal;

(ii) to (vi) .....

(c) in accordance with this or any other Law."

12. And, finally for present purposes, section 5(1) provides:

"5 (1) Subject to section 3(2), whoever -

(a) being in possession of confidential information however obtained-

(i) divulges it; or

(ii) attempts, offers or threatens to divulge it; or

(b) willfully obtains or attempts to obtain confidential information is guilty of an offence and liable on summary conviction to a fine of five thousand dollars and to imprisonment for two years"

13. The combined effect of the foregoing provisions is that it would indeed be an offence for the Applicants to divulge Ms. Womack's confidential information irrespective of where the Applicants now happen to reside; that information having come into their possession in the course of a professional relationship which arose within the Cayman Islands, Ms. Womack's consent not having been obtained and unless directions are now given by this Court allowing them to divulge it by the giving of evidence.

14. There is however, one further exemption to be noted now – that allowed under section 3(2)(c) as set out above, where the divulgence would be in accordance with *"any other Law"*. As I will come to explain below, it is of pivotal importance to the outcome of these applications that the Applicants may be allowed to divulge the information in keeping with the provisions of the TIAL which itself also provides that in that event, the provisions of the CR(P)L would be disapplied[3].

15. Thus, there is the mutual recognition under the regimes both of the CR(P)L and the TIAL, that where in the public interest the divulgence of confidential information is appropriate for the interdiction of criminal offences (including criminal tax offences covered by the TIAL), there are measures in place to ensure that the evidence will be given. And this, notwithstanding any private interest in the confidentiality of the information which would otherwise be protected by the CR(P)L or for that matter, by operation of contract or by the common law.

16. The question to be resolved as it appears to me is therefore this: whether, in the exercise of the discretion vested by section 4 of the CR(P)L, it is appropriate that I should give the directions which the Applicants seek, bearing in mind especially that the TIAL would clearly apply to two of the Applicants who still reside here and so

[3] See sections 8(6), 18(1) and 19(2) of the TIAL.

within the remit of the TIAL and at least arguably also to those two Applicants who, although no longer resident here, would seek to divulge confidential information which they acquired in the course of a professional relationship within the Islands.

ANALYSIS

17. These Applications were not brought with notice having been given to Ms. Womack. But Notice haven been given on my directions, she appeared in person and represented by Mr. Huskisson who raised a number of objections.

18. That which I consider to be largely dispositive and which I will address now, is jurisdictional in nature. It is that the only proper jurisdictional basis for the compulsion of divulgence of confidential information in aid of foreign criminal tax proceedings, is not section 4 of the CR(P)L but under the TIAL. The force of this was immediately apparent if I was to avoid the circumvention of the TIAL and the Tax Information Exchange Agreement with the United States (the "Treaty") (together hereinafter the "TIAL Regime"); which would be the result of the directions which the Applicants seek under section 4 of the CR(P)L. This would be the result in relation at least to Messrs. Owen and Gray, the two Applicants who still reside in this jurisdiction and to whom the TIAL Regime would doubtless apply.

19. It is important for a proper analysis of this issue, to emphasize that the Applicants seek now to disclose in criminal tax proceedings in the United States, information which they came to acquire in their capacities as Mrs. Womack's fiduciaries and in respect of which they owe her the duties of confidence discussed above.

20. This is the proposition that brings into focus the fact that Ms. Womack's legal interest in the confidentiality of the information to be disclosed, would be determined if these Application are granted. While such interests are determinable in deference to foreign criminal proceedings, the question becomes – by what due process of law?

21. The starting point is to observe that were it not for the provisions of the TIAL Regime (to be examined below), the allegations of criminal tax offences now indicted before the Missouri Court would not provide a legal basis for the compulsory disclosure of information, the confidentiality of which is protected by Cayman Islands law [4].

20. It is however, also the case, as Lord Goff explained on behalf of the House of Lords in *Re the State of Norway's Applications* (Nos.1 & 2)[5], that although the courts do not assist in the direct or indirect enforcement in England of the revenue laws of a foreign state, that rule did not extend to the seeking of assistance in obtaining evidence to be used for the enforcement of the revenue laws of the foreign state in that state itself. On that basis, although the relevant Hague Convention then under consideration by the House of Lord[6] included civil and commercial but did not expressly include tax matters, it was construed as including civil tax matters for the purposes of giving assistance to Norway, another Convention State.

21. In acknowledging this principle here, I must however emphasize, that the House of Lords was there responding to letters of request from a Norwegian Court pursuant to the Hague Convention, in the exercise of jurisdiction vested by United Kingdom

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[4] It is settled law that in the absence of treaty, a state has no obligation to enforce the penal or fiscal laws of other states. See *Huntington v Attrill* [1893] A.C 150; Government of India v Taylor [1955] A.C. 491., followed and applied in this jurisdiction, in among other cases, in *Re Ansbacher*; in Re H (both below)

[5] [1990] 1 A.C. 723 H.L.

[6] The 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

statute – the Evidence (Proceedings in Other Jurisdictions) Act 1975[7]. There is no such request from the Missouri Court in these proceedings and so the equivalent Cayman Islands jurisdiction under the 1978 Evidence Order is not engaged.

22. Most apposite now is the fact that the TIAL Regime embodies a specific mechanism and process for the execution of requests by the United States for the disclosure of confidential information for use as evidence for tax proceedings or investigations[8].

23. Accordingly, the TIAL Regime allows not only for the exchange of tax information by way of document production but also by way of live testimony – specifically the mode of evidence for which the Applicants here seek directions pursuant to section 4 of the CR(P)L.

24. Section 8 of the TIAL provides in this respect as follows:

> *"8. (1) Where, under a request, any person is required to testify, the Authority shall apply to a Judge for the Judge to receive such testimony as appears to him to be appropriate for the purpose of giving effect to the request, and such testimony shall be provided to the competent authority of the requesting Party.*
>
> *(2 The Judge may, in pursuance of an application under subsection (1), issue a subpoena, take evidence under oath and exercise any other power which the Grand Court may exercise for the purpose of compelling testimony.*

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[7] That which incorporated the Hague Convention into U.K. domestic law and which was extended (as modified) to the Cayman Islands by the Evidence (Proceedings in other Jurisdictions) (Cayman Islands) Order 1978 (the "1978 Evidence Order") thereby also giving effect with no to the Hague Convention.

[8] Similar treaties have been entered into with the many other Countries listed in the Schedule to the TIAL.

(3) A person shall not be compelled in any proceedings under this section to give evidence which he could not be compelled to give in proceedings in the Islands.

(4) Where, under a request, the Authority considers it necessary to obtain specified information or information of a specified description from any person the Authority shall –

(a) in the case of information required for proceedings in the territory of the requesting party, apply to a judge for an order to produce such information; or

(b) in the case other than that referred to in paragraph (a), issue a notice in writing requiring the production of such information as may be specified in the notice; and such notice may require the information –

(i) to be provided within a specified time;

(ii) to be provided in such form as the Authority may require; and

(iii) to be verified or authenticated in such manner as the Authority may require.

(4A)For the purposes of subsections (4) and (13) the word "proceedings" means criminal proceedings.

(5)....

(6) An order under subsection (7) or a notice under subsection 4(b) -

(a) shall not confer any right to production of, or access to, items subject to legal privilege; and

(b) shall have effect notwithstanding any obligation as to confidentiality or other restriction upon the disclosure of information whether imposed by the Confidential Relationships (Preservation) Law 2009 (Revision), any other Law or the common law."

25. The mandatory terms and effect of subsection 8(1) are of particular note and emphasis providing as it does that where a request is made for live testimony in relation to a tax matter covered by the TIAL Regime, the Authority shall apply to a Judge. As the rest of subsection (1) and subsections (2) and (3) also explain, the plenary powers of the Court are then engaged and they must be regarded as intended to allow the Court to give effect to the TIAL Regime, especially but not exclusively, the specific requirements of the Treaty for the procurement of live testimony. These powers of the Judge will include the discretionary power (as I explain further below) to direct that notice of the proceedings be given to the person affected by the Request – here Ms. Womack – giving the opportunity if the Judge also so directs, to hear, observe and to cross-examine upon whatever testimony may be given to be used against her in the context of the criminal tax proceedings before the Missouri court.

26. The present applications under section 4 of the CR(P)L would circumvent those requirements and safeguards of section 8, especially the opportunity for the Judge in exercise of the discretion, to direct that notice of the proceedings be given to Ms. Womack. And for reasons which I also expand upon below, the notice which I

directed under section 4 CR(P)L to be given to Ms. Womack of these applications is no substitute for notice which would allow her participation under section 8 of the TIAL.

27. The section 8 requirements and procedural safeguards are consonant with the procedure envisioned by the Treaty, Article 5.3 of which provides (in relevant part and typically of many of the treaties) as follows:

> "*3. If specifically requested by the competent authority of the applicant Party, the competent authority of the requested Party shall, to the extent allowable under its domestic laws:*
>
> *(a) specify the time and place for the taking of testimony or the production of books, papers, records and other data;*
>
> *(b) ....*
>
> *(c) permit the presence of individuals designated by the competent authority of the applicant Party as being involved in or affected by execution of the request...*
>
> *(d provide individuals permitted to be present with an opportunity to question, directly or through the executing authority, the individual giving testimony or producing books, papers, records and other data...."*

28. While Article 5.3 of the Treaty speaks in mandatory terms of an "*individual affected*" being permitted to be present "*If specifically requested*" by the competent authority of the "*applicant Party*" (here the U.S.A.), the discretionary power vested in the Judge by subsection 8(2) of the TIAL is not so circumscribed.

29. The discretionary power is at large, and so the Judge may exercise any "power" that the Grand Court may exercise for the purpose of compelling testimony; which must include for instance, and as Article 5.3 envisages, the power to direct that a witness submits to cross-examination. The power will therefore in my view, be exercised in accordance with the rules of fairness, cognizant of the fact that far from it being inimical to the TIAL Regime or the public interest in the due execution of requests that notice should be given, the Treaty itself contemplates notice being provided to persons affected and speaks in Article 5.3, in mandatory terms of notice being given when the applicant Party so requests.

30. The Judge will be cognisant that the requirements of fairness pay due regard to the constitutional rights of the person affected. In this respect section 7(1) of the Constitutional Bill of Rights[9] provides:

> *"Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time."*

31. On its face, this is a right to a fair, public and timely hearing whenever it is proposed that one's legal rights (or obligations) are to be determined. As discussed above, that would be the situation here in respect of Ms. Womack's legal right to the confidentiality of information imparted or developed in the context of professional or fiduciary relationships with the Applicants, if that legal right is to be determined in deference to the criminal tax proceedings before the Missouri Court. Ms. Womack would therefore in my view, be entitled to the protection of the constitutional rights either for being someone present within the Islands (as she has been during these

[9] The Cayman Islands Constitution Order Schedule 2, Part I

proceedings before me) or as someone coming to and doing business within the Islands and so would ordinarily be entitled to the protections to be afforded by the due process of Cayman Islands law.

32. Accordingly, where – as I was told by Mr. Austin-Smith is the present situation – there is as yet no request by the United States under the TIAL Regime for any of the Applicants to give live testimony in aid of the proceedings before the Missouri Court, equally there is as yet no indication one way or the other whether Ms. Womack should be given notice in the event such a request is made.

33. Indeed, in coming to my decision that all but perhaps one of these four applications under section 4 of the CR(P)L are misconceived, I have had to contemplate what could be expected to happen if a request were made under the TIAL Regime for the testimony of the Applicants (or any of them) to be taken for the purposes of the proceedings before the Missouri Court.

34. In the first place, as the TIAL Regime envisages that the determination of the legal rights in the confidentiality information to be divulged will be a matter for a Judge in the exercise of judicial discretion in accordance with section 8 of the TIAL, one would expect the Request to address the subject of notice.

35. Accordingly, if the applicant Party (here the United States pursuant to Article 5.3 of the Treaty) specifically requests that notice not be given, one would expect some explanation, such as that the giving of notice would prejudice the criminal tax investigation, expose potential witnesses to interference or possibly result in evidence

tampering, undue delay or some such concern[10]. Any such explanation would be considered by the Judge in the exercise of discretion.

36. It follows, that if the applicant Party is silent on the matter, the judicial discretion will be exercised with the requirements of fairness nonetheless in mind.

37. And so, when this matter is examined in the context of the information being confidential in nature and the existence of a legal right to its protection from unauthorized disclosure; the requirement of section 8 of the TIAL that there must be a judicial determination of such rights and, most telling here – the constitutional right to a fair hearing before that right can be determined[11]; this all results in my view, in there being a default position in favour of the right to be heard before the confidential information may be divulged and used as evidence to the detriment of the person affected.

38. To be clear, I do not regard this as an absolute right to a hearing, rather it is a right qualified by the judicial discretion to grant a hearing, having regard in particular to any reasonable request from the applicant Party, that notice not be given.

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[10] This is in contradistinction to a request in furtherance of a civil tax investigation or proceeding. Under the TIAL Regime. In such circumstances, the TIAL Authority is specifically required by section 17(1) of the TIAL to provide notice of the request to a person who is the subject of the request, subject, inter alia, to subsection 17(5) which states that the requirement to give notice shall not apply where a requesting Party makes a request in urgent cases or in cases where notification is likely to undermine the success of the investigation in the jurisdiction of the requesting Party. These provisions were the subject of a recent judgment of the Court of Appeal in which the mandatory nature of the notice requirement in respect of civil tax matters was confirmed: *Cayman Islands Tax Information Authority v M.H. Investments et al*, CICA No 31 of 2013,31 July 2015.

[11] Consonant also with the presumption of innocence, itself another fundamental right recognized by section7(2) (a) of the Constitutional Bill of Rights in relation to persons charged within the Islands with a criminal offence. As will be discussed further below, the presumption of innocence is a right observed by other regimes for mutual legal assistance where they impose a threshold test that request the showing of reasonable cause to believe that an offence has been committed. The absence of this threshold test from the TIAL Regime does not diminish but enhances the importance of notice.

39. But the value and importance of notice should not be diminished. As already mentioned, this might provide an opportunity to the person affected not only to be present when the information is to be disclosed but also to seek to ensure by cross-examination at the earliest opportunity that only such information that is disclosable under Cayman Islands law and as would be properly responsive to the request, is disclosed. And this early opportunity to cross-examine will often be of more than poignant value when matters of close confidences or allegedly so, are to be revealed. The opportunity to participate upon being given notice could also be important for the further reason that it will put the person affected in a position of being able later to ensure that the information disclosed will be afforded the kind of protections from abuse within the jurisdiction of the applicant Party such as are contemplated by the Treaty itself (in the case of the U.S.A, Article 10) where it provides:

> *"CONFIDENTIALITY*
>
> *Any information received by a Contracting 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 Contracting 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, or the oversight of such functions...."*

40. Accordingly – and notwithstanding that Article 10 of the Treaty goes on to explain that the information disclosed may be used with the prior written consent of the requested Part (here the Cayman Islands), for other kinds of investigations and

proceedings, including other more universally recognizable criminal proceedings covered by the Mutual Legal Assistance (United States of America) Treaty (the "MLAT")[12] – the person affected would have had notice of what was divulged and in what way and under what circumstances it may be further deployed to his or her detriment. This, in turn, would allow the person affected to invoke whatever further protective measures may be available under the laws of the applicant Party[13], pursuant to the Treaty, the MLAT or otherwise.

41. In concluding as I have for the qualified default position in favour of notice being given to the person affected, I must also note that I have taken account of two further matters of importance.

42. First, I have seen extracts of two relevant ex tempore rulings by Justice Williams of this Court. These were given on 5th June 2014 and 18th November 2015 upon earlier applications by the TIAL Authority for orders for the divulgence of documentary information, including confidential information held by her former bankers and by Willis Cayman itself, in respect of Ms. Womack's accounts and affairs. Those applications also touched upon other named individuals related to Ms. Womack – her

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[12] The MLAT itself is incorporated into Cayman law by the Mutual Legal Assistance (United States of America) Law, 1999 Revision (together the "MLAT Regime") and so – also consonant with the presumption of innocence – the threshold requirement of a prima facie showing of an offence is incorporated into Cayman law for all offences covered by the MLAT. These, until the advent of the TIAL Regime, specifically excluded pure tax offences.

[13] A further protective measure recognized by the TIAL Regime (which may or may not be available to Ms. Womack in the present context) relates to the protection of privileged information. In this regard Article 5.2 of the treaty provides in part: "... Privileges under the laws and practices of the **applicant Party** shall not apply in the execution of a request by the requested Party and the resolution of such matters shall be solely the responsibility of the applicant Party". It follows that a claim to privilege under the laws and practices of the **requested Party** will be resolved by the requested Party during the execution of a request. Also of potential protective relevance in others if not in this case, Article 9.2 provides that: "The provisions of this Agreement shall not impose on a Contracting Party the obligation to supply information that would disclose any trade, business, industrial, commercial or professional secret or trade process. This and the measures for protection of privileged information are incorporated into Cayman law by subsection 8(7)as read with subsection8(9) of the TIAL(above), where such claims under Cayman law are to be resolved by the Judge.

husband and her accountant – but the assurance was given that the information would be used solely in relation to the proceedings against Ms. Womack.

43. After a consideration of the requirements of the TIAL Regime and insisting that he be shown a copy of the relevant Request to satisfy himself that it complied, Justice Williams expressed the view in his ruling of 5th June 2014 that: "As [the] proceedings are related to criminal matters, these matters are heard not on notice [to Ms. Womack]." And, in his ruling of 18 November 2015, that *"...the provisions of section 17(1) [of the TIAL] have been complied with, for as this relates to [a] criminal matter,* [she] *need not be served with notice by the Authority*[14].

44. This judicial approach must, in my view, be understood in the context that the Judge was there dealing with requests for the production of documents only[15] under Section 8(4).

45. Requests for live testimony, often to be satisfied by way of elaboration or expression of opinion on whatever information documents reveal, are of a different order. From the point of view of the person affected that will often be the most consequential kind of evidence in the context of the foreign criminal proceedings.

46. I am therefore not prepared to assume that had Justice Williams had such a request before him – one that engages the jurisdiction of the Court under Section 8(1) of the TIAL for the taking of live testimony – he was bound to have proceeded on the basis of the same assumption that it not be heard on notice to the person affected. Nor is this view of his rulings necessarily altered by his reference to section 17(1) of the

[14] At bottom of page 32 of ruling of 5th June 2014 and bottom of page of ruling 18th November 2015, respectively,

[15] Described by Section 8(4) of the TIAL as a request for "specified information or information of a specified description from any person .."

TIAL – that which mandates the giving of notice when the request is one that relates to a civil tax matter. He may well have taken a different view if he was comparing the situation under section 17(1) with a request for live testimony in aid of criminal tax proceedings under section 8(1), rather than with the application before him under section 8(4) for the production of documents only.

47. Indeed, there is some indication of a potentially broader view of the requirements of fairness in his ruling of 18 November 2015 where (in the middle of page 3) he noted:

> *"I again remind myself of what Charles Quin J rightly stated at Paragraph 9 in his most helpful judgment in Cause Number G391/2012 dated the 28 February 2013:*
>
> > *"the requirement to apply to a judge under Section 8(4)(a) of the TIAL Law is an essential safeguard for a person affected by the Request for information to ensure that their rights of privacy and confidentiality are not unfairly prejudiced."*

48. The position must be a fortiori with a request for live testimony under Section 8(1) and doubtless that is why it is in that context that the Treaty contemplates the giving of notice, including in criminal tax proceedings, where live testimony is to be obtained.

49. In summary then, the advisable approach, in my view, would therefore be that when presented with an application in furtherance of a request under Section 8(1), the Judge would require to see the Request itself and the terms of the questions[16] upon which

[16] The established practice with requests of this kind under the MLAT, the 1978 Evidence Order and the CJIC involves a list of questions being enclosed with the Request and which would be provided to the Authority or

the witness(es) would be examined. He would then consider, among other things, the likely impact and importance of the evidence to be marshalled and whether notice should be given to any person affected, and whether any person affected should be allowed to participate, and to what extent.

50. The other factor of which I have taken account in arriving at my conclusion in favour of the discretion to give notice is the further comparative significance of the MLAT Regime which, along with the CR(P)L, the 1978 Evidence Order and the CJIC, are in *para materia* with the TIAL Regime, as they all deal with the giving of evidence for foreign courts or authorities.

51. It is settled that a treaty for mutual legal assistance in the investigation or prosecution of criminal offences is an agreement between the states parties and not one that recognizes an automatic right of intervention for persons affected by requests made pursuant to it, including even when the confidentiality of information is to be overridden. The requirements of fairness may however, necessitate that a hearing be afforded pursuant to an MLAT request and this will depend on the terms of the legislative scheme for enforcement of the MLAT. See the judgment of the Court of Appeal[17] in *Bertoli v Malone* 1990-91 CILR 58 where that principle was confirmed and it was held further, among other things, that the statutory framework of the MLAT did not admit of a right to a hearing "*since the principles of natural justice were not meant to be applied as rigid rules to frustrate the intent of the legislature*" which the Court of Appeal declared, is meant to ensure that assistance is given expeditiously in appropriate cases and to that end, the MLAT Authority was said to

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the court prior to the hearing. There is no obvious reason why the same practice should not be followed under the TIAL.

[17] Upheld on appeal to the Privy Council, see 1992-93 CILR Note 1

be required by section 4 of the MLAT Law, to decide upon requests "*acting alone and in an administrative capacity.*"

52. The TIAL Regime is clearly different, as discussed above: the Treaty itself contemplates the giving of notice as a requirement of fairness and section 8 of the TIAL vests the Judge with the power and duty to act judicially not merely administratively and so, it must be inferred, with the discretion to ensure fairness. For these reasons, and for completeness, I do not regard the dictum from the *Bertoli* case as a bar to the giving of notice under the TIAL Regime.

53. By contrast and returning to the present applications – no safeguards like those required by the Treaty to be observed by the giving of notice, are readily available when confidential information is disclosed by way of directions under section 4 of the CR(P)L. While subsections 4(2) and (3) of the CR(P)L (as set out above), contemplate the judge stipulating conditions for the giving of the evidence which would be intended to protect against unwarranted abuse of the information to be divulged, no such conditions could operate in a case like the present as a fetter upon the powers of the Missouri Court when trying the case before it. Nor could such conditions imposed by this Court operate as a fetter upon the United States Agency (here the Inland Revenue Service, "IRS"), in terms of how the IRS might otherwise deploy the information in other proceedings or for other purposes within its remit or that of other agencies (within or without the United States) with whom it may be required to co-operate. This is obvious from the very fact that the IRS is not a party to these applications and so would not be bound by any conditions imposed and orders

made pursuant to Section 4 CR(P)L, which, in any event and unlike the Treaty, can have no extra-territorial reach.

54. While conditions have been imposed in some cases pursuant to section 4 of the CR(P)L[18], that happened in circumstances where this court was also able to put in place measures for their enforcement. No such measures can be put in place in the present circumstances and while Mr. Austin-Smith suggested that some could be imposed to assimilate the protections afforded by the TIAL Regime, none was specified by him.

55. I am satisfied that under section 4 CR(P)L, there is no way of ensuring that the kinds of safeguards provided by the TIAL Regime – applicable to an occasion such as when Ms. Womack's confidential information would be disclosed in evidence in criminal tax proceedings before the Missouri Court – will be available if the Applicants were given the directions which they now seek to allow them directly to testify before that Court.

56. And such concerns have in the past led this Court to refuse the giving of directions for disclosure of confidential information pursuant to Section 4 of the CR(P)L on grounds of fairness and public policy. See, for example: In the Matter of H 1996 CILR 237, where an application for directions to testify in response to a Grand Jury's subpoena was refused on the grounds, inter alia, that the Grand Jury was not a court

[18] For example in Re Ansbacher (Cayman) Limited 2001 CILR 214 (where redactions were made as directed by the Court to anonymize and protect the identities of clients of Ansbacher Bank in circumstances where their identities were not relevant to the Irish court's inquiries into whether Ansbacher was carrying on illegal banking business in Ireland) and *In Re Codelco* 1999 CILR 42 where among other things, it was recognized that in appropriate circumstances (not present in that case), this court could require an undertaking from the foreign agency that the information divulged was not be used for any purposes apart from the foreign court proceedings in respect of which directions were given under section 4 of the CR(P)L

and so was owed no obligation of comity and further, that its subpoena was predicated on an unsubstantiated presumption of invalidity of a Cayman trust.

57. Mr. Austin-Smith presents a further argument which relies upon the particular circumstances of two of the Applicants here – Mr. Ogden and Mr. Byrne – citing the fact that they reside respectively in the U.S.A. and in Ireland.

58. Mr. Austin-Smith contends that neither of these two Applicants can be required to testify pursuant to section 8 of the TIAL because they no longer reside in Cayman and so do not come under the jurisdiction of the TIAL.

59. In Mr. Ogden's case, he has been subpoenaed to testify in the United States (as mentioned above) and is therefore caught in the invidious position if his application is now refused, of having to choose between disobeying the subpoena (at risk of penalty in the U.S.A.) or disclosing confidential information in breach of the CR(P)L (and so at risk of penalty here under the CR(P)L).

60. For Mr. Byrne's part, not being under compulsion of subpoena, if the directions he seeks are not given, he will simply not testify before the Missouri Court although he wishes to do so. Although he did not explain, it is reasonable to assume that apart from the notion of fulfilling Willis' "good corporate citizen" obligations, he would also be testifying in his own interest to avoid being the subject of coercive measure in the near future, such as when he might travel to the United States.

61. The other two applicants Messrs. Owen and Gray, are not faced with the same kinds of difficulties: they reside in the Cayman Islands and so the jurisdiction limitation argument raised by Mr. Austin-Smith, would not apply to them. Indeed, it is acknowledged by him that they could be the subjects of a request under the TIAL

Regime. They too, however, would wish to testify voluntarily presumably in their own interests; for the same sort of reasons as would Mr. Byrne and so they press these applications.

62. As regards Mr. Ogden, I do not accept that the happenstance of his residence outside the Cayman Islands is determinative of the jurisdiction of the TIAL Regime. His situation requires further consideration and the starting point is with Article 2 of the Treaty which provides:

"Jurisdiction

A requested Party shall not be obligated to provide information that is neither held by its authorities nor in the possession or control of persons who are within its territorial jurisdiction. With respect to information held by its authorities or in the possession or control of persons who are within its territorial jurisdiction, however, the requested Party shall provide information in accordance with this Agreement regardless of the residence or nationality of the person holding the information or to whom the information relates."

63. By Article 1(m) of the Treaty the term "information" means "any fact, statement or record in any form whatever" and this definition is adopted and expanded upon by section 2 of the TIAL itself.

64. The definition clearly includes information which would be divulged and/or obtained by the giving of evidence. Further, the obligations created by Article 2 in specifying the jurisdictional reach of the Treaty (along with all other Treaty obligations), are incorporated into domestic Cayman law by section 3(3) of the TIAL where it states

that: "*A scheduled Agreement [such as the Treaty] shall, for such period as is specified in the Agreement, have legal effect in the Islands*".

65. It is immediately apparent that Article 2 of the Treaty creates a dichotomous obligation of enforcement and the dichotomy is as between information itself and the person or entity in possession or control of it. Where information is neither possessed nor controlled by an authority or person within the territorial jurisdiction of a requested Party, the Party has no obligation to provide the information under the Treaty. But where the information is so possessed or controlled, there will be an obligation to provide it regardless of where the person possessing or controlling it may be residing at the time of the request or the nationality of that person (or the residence or nationality of the person to whom the information relates).

66. Accordingly, and with regard especially to Article 2 of The Treaty, were a request in proper form to be sent by the United States Authorities for Messrs. Ogden or Byrne to give evidence of information which is still in their possession or evidence which they could not be expected to give without access and reference to information which is still under the control of Willis Cayman within the Cayman Islands, there would clearly be an obligation on the part of the TIAL Authority to require them to do so, wherever they may happen to reside. For the sake of emphasis, the operative provision for those purposes would be the following aspect of Article 2; creating the obligation to assist:

> "*With respect to information in the possession or control of persons who are within its territorial jurisdiction... regardless of the residence*

or nationality of the person holding the information or to whom the information relates."

67. Notwithstanding that both of these Applicants have submitted to the jurisdiction of this Court in bringing these applications, Mr. Austin-Smith argues that as neither resides any longer in the Cayman Islands and as both intend to give "live evidence" to the Missouri Court, the TIAL Regime does not apply to them. As he puts it at paragraph 21 of his written submissions:

> "*The provisions of section 8 of the TIAL allow for testimony to be taken from witnesses within the Cayman Islands for use in the courts in the USA. However, in this instance, the Applicants intend, or are required, to give live evidence in the USA – something not provided for by the Cayman legislation other than following an application under the CR(P)L".*

68. In the circumstances of this case where each Applicant has presented himself in this jurisdiction before this Court, the artificiality of this argument is patent. The allegations here being fiscal and penal in nature and are therefore covered peculiarly by the TIAL Regime (as discussed above), if a request were sent by the United States referencing Article 2 of the Treaty, Mr. Ogden and Mr. Bryne could simply submit to the jurisdiction of this Court pursuant to section 8 of the TIAL, in like manner as they do now for the purposes of the present applications. They could then be directed and allowed to testify by reference to the information still within their or the control of Willis Cayman here, in a manner to be regulated by this Court as contemplated by the TIAL Regime but which could not be assimilated (for reasons already explained)

were they allowed to testify directly before the Missouri Court pursuant to these applications under the CR(P)L. Given the terms of Article 2, such a request would clearly not be precluded by the fact that these two Applicants now respectively reside in the United States and in Ireland. Indeed, Article 2 may well be regarded as aimed precisely at circumstances like those presented here by them – being persons who became cognizant of relevant confidential information in their capacities as professionals while working within the Islands, although they no longer reside here.

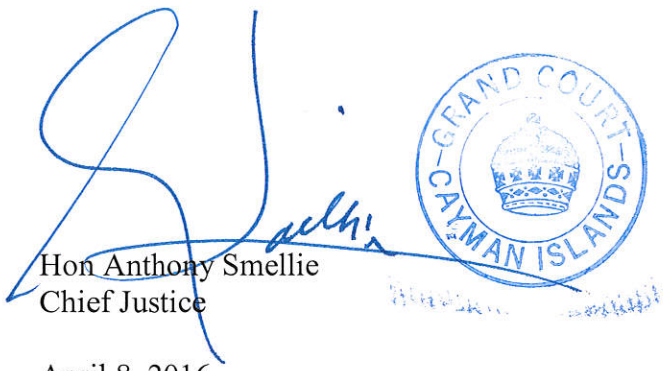
69. It is, moreover, just as well to note the impracticality of any suggestion that any of these four Applicants could give accurate or credible evidence without having access to the information that was generated within the context of their fiduciary relationship with Ms. Womack and which may well remain under Willis Cayman's control within the Islands. The evidence lodged in support of these section 4 applications reveal that their professional relationships with Ms. Womack developed over a number of years and the records held by Willis Cayman must therefore likely be voluminous and extensive.

70. But all that said, I consider that I can still have regard to the peculiar situation in which Mr. Ogden finds himself. I therefore note that pursuant to the orders of Justice Williams made under section 8(4) of the TIAL, certain documentary evidence has already been disclosed to the IRS and that these would include copies of documents held by Willis Cayman. This being so, and if it can be said that Mr. Ogden as a person already subpoenaed by the Missouri Court can give his testimony without recourse to confidential information which is not yet disclosed by Willis Cayman and

which relates to Ms. Womack, I would consider that to be a good practical basis for treating with his present application differently, as a matter of discretion.

71. As presently informed however, and for all the reasons explained above, I am satisfied that these four applications are inappropriate. The Applicants should await a request (or requests) pursuant to the TIAL Regime to which they might be called upon to respond. In so doing, not only might they fulfill any personal obligations to testify (and for that matter any perceived good faith corporate obligation of Willis's) but they will also submit to a process which can be expected to protect any residual legitimate interest of Ms. Womack's recognized by the Treaty, in preventing the misuse or abuse of her confidential information.

72. The applications are refused, with no orders as to costs



Hon Anthony Smellie
Chief Justice

April 8, 2016