

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

**Claim No. BVIHCV 2015/0339 and 0340
BETWEEN:**

**(1) FRIAR TUCK LTD.
(2) QUIVER INC.**

Claimants

And

INTERNATIONAL TAX AUTHORITY

Defendant

Appearances: Mr. Jonathan Addo with him Mrs. Tamara Maduro, Counsel for the Claimants
Mrs. Jo-Ann Williams-Roberts Solicitor General with her Mrs. Kaidia Edwards-Aliser Ag. Principal
Crown, Counsel for the Defendant

2017: March 31st

JUDGMENT

- [1] **Ellis J.:** Both of the Claimants in these actions are companies incorporated under the laws of the BVI. The Defendant ("ITA") is a public functionary which is empowered under the Mutual Legal Assistance ("Tax Matters") Act 2003 (as amended) ("the MLA") to inter alia require the production of such information as is necessary in order to comply with requests from foreign governments.
- [2] Under cover letters dated 6th March, 2015 and 30th July, 2015, and pursuant to its powers under section 5 of the MLA, the ITA served Notices on the Claimants requiring them to provide specific information which was itemized in Schedules to the Notices by way of production of documents and or by way of verification. This was to be accompanied by Affidavit in a specified form. These Notices made clear that pursuant to section 5 (6) of the MLA, a person who without lawful or reasonable excuse fails to comply with the terms of the Notice commits an offence and is liable on conviction to a fine or imprisonment.

- [3] The Notices did not provide the details of the contents of the request from the foreign authority, including the identity of the requesting state. In addition, the Claimants contend that the Notices did not identify the relevant taxpayer who would be the subject of the enquiry, the relevant tax years under investigation or otherwise the period of interest. It also did not identify the tax purposes for which the information is sought or the reasons for believing that the information requested is foreseeably relevant to the administration or enforcement of the domestic laws of the requesting state.
- [4] By letters dated 8th May, 2015 and 7th September, 2015, the Claimants' legal representatives sought to bring their concerns to the attention of the ITA. In particular, they highlighted their inability to assess the validity of the Notices given the lack of information or the absence of the factual basis underlying the requests.
- [5] The ITA responded in a letter dated 25th November, 2015. That letter made clear the ITA's position that under the MLA, the ITA has no obligation to outline the name of the taxpayer, the requesting jurisdiction or any other information to a third party when a notice to produce information has been issued. The letter stressed the ITA's duty of confidentiality under Article 8 of the relevant Tax Information Exchange Agreement which it contends prohibits the disclosure of information to the recipient of a Notice.
- [6] The ITA avers that the relevant Request was properly vetted and the Notices were properly issued and therefore this application for judicial review is without merit. The Claimants' on the other hand contend that the ITA has acted in breach of the fundamental duty of fairness and unlawfully by failing to disclose any material information concerning the factual basis for the issuing of the Notices to enable them to assess the validity and if necessary, challenge the Notices.

GENERAL LEGAL PRINCIPLES

- [7] It is now settled law that whenever a public function is being performed there is an inference, in the absence of an express requirement to the contrary, that the function is required to be performed fairly. This inference will be much more compelling in the case of any decision which may adversely affect a person's rights or interests or when a person has a legitimate expectation of being treated

fairly.¹ Indeed, courts have on occasion gone further to supplement statutory provisions with principles of procedural fairness. In 1987, Lord Bridge had this to say in **Lloyd v McMahon**²:

“In particular, it is well-established that when a statute has conferred on anybody the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure attainment of fairness.”

[8] This principle was later reinforced in 2013, by Lord Sumption in **Bank Mellat v HM Treasury**³ where he stated:

“The duty of fairness governing the exercise of a statutory power is a limitation on the discretion of the decision-maker which is implied into the statute. But the fact that the statute makes some provision for the procedure to be followed before or after the exercise of a statutory power does not of itself impliedly exclude either the duty of fairness in general or the duty of prior consultation in particular, where they would otherwise arise. As Byles J observed in **Cooper v Wandsworth Board of Works (1863) 14 CB (NS) 180, 194**, “the justice of the common law will supply the omission of the legislature.”

[9] However, it is clear that in following this course, judicial restraint is necessary. Lord Reid made this clear where he stated in **Wiseman v Bourneman**⁴:

“For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation.”

[10] The learned writers in DeSmith’s Judicial Review⁵ have set out a court’s task in the following terms:

“The test today of whether to supplement statutory procedures is no longer whether the statutory procedure alone could result in manifest unfairness. The preferable view is that fairness must, without qualification, be attained, and that the “justice of the common law” may supplement that of the statute unless by necessary implication the procedural code must be regarded as exclusive. Under either test, similar factors are likely to be relevant: the comprehensiveness of the codes, the degree of deviation from the statutory procedure required, and the overall fairness of the procedures to the individual concerned.”

¹ DeSmith’s Judicial Review, Seventh Edition – paras 7 – 009

² [1987] AC 625 at 702

³ [2013] UKSC 39 at para.35

⁴ [1971] AC 297 at 308

⁵ Seventh Edition

- [11] The arguments advanced on behalf of the ITA do not assert that rules of procedural fairness do not apply in the case at bar. Instead, the ITA asserts that in the absence of an express requirement for disclosure, the ITA is under no obligation to do so. Without having regard to the overall fairness of the procedures prescribed, the ITA's position is that the information contained in the requests are confidential state to state communications which the ITA is not obliged to provide to the Claimants under the terms of the MLA.
- [12] In the Court's judgment, and applying the relevant test recommended here, the "justice of the common law" demands that the ITA acts in a manner that is procedurally fair to the Claimants. However, the Court is fully cognizant that the duty of procedural fairness cannot be applied in a hard and fast way. The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and rights affected. Ultimately, administrative decisions must be made in a fair and open procedure which is appropriate to the statutory, institutional and social context of the decision which is to be made.
- [13] In that regard, the courts have identified a non-exhaustive list of factors which are relevant to determining what is required by the common law duty of procedural fairness in any given set of circumstances. These include inter alia:
1. The nature of the decision and the process followed in making it.
 2. The nature of the statutory scheme and the express terms under which the public body operates.
 3. The importance of the decision to the individual(s) affected and the consequences which follow.
 4. The legitimate expectations of the person likely to challenge the decision.
- [14] The factual matrix of the case at bar is by no means a typical one. The claim concerns requests made to the BVI Government for exchange of information relating to taxes pursuant to a Tax Information Exchange Agreement (TIEA) entered into between the BVI and the Government of another jurisdiction. The BVI's obligations under TIEA are given effect in domestic law by the MLA.

- [15] The BVI's decision to enter into tax information sharing agreements with foreign governments arises from its formal written commitment to comply with the OECD's principles of transparency and exchange of information as set out in the OECD Agreement on Exchange of Information on Tax Matters.
- [16] The Notices issued to the Claimants by the ITA were made following receipt of a request for information from an unnamed requesting state with which the BVI has signed a TIEA. Although the material TIEA was not before the Court, the ITA has provided a copy of the model agreement, Article 1 this model prescribes that competent authorities of the contracting parties shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the contracting parties concerning taxes and tax matters including information which is foreseeably relevant to the determination, assessment a, verification, enforcement, recovery or collection of tax claims with respect to person subject to such persons.
- [17] The relevant Notices demand inter alia that the Claimants provide private information relative to bank accounts held by them, and possible transfers from those bank accounts as well as informing relative shareholdings held by the Claimants.
- [18] It is apparent that the ITA is not an investigative or adjudicative body but rather an administrative body operating within a context of international cooperation. The MLA and the TIEA process does not involve a trial. It contemplates only the transmission of information to the Requesting State. In the event that it is used in a criminal or civil proceedings almost certainly, the subject of the request would have an opportunity to respond and to make representations.
- [19] Nevertheless, the Claimants contend quite rightly that the ITA is purporting to exercise a power to compel the Claimants to disclose otherwise confidential information to an unknown foreign authority. This power is backed by a criminal sanction for any failure to comply. Compliance is therefore neither discretionary nor optional.
- [20] Further, it is apparent that when the decision to issue the notice is made, it is determinative of the issue. Representations are not solicited or considered prior to the issuance of the notice. Moreover it is apparent that there are no appeal procedures provided within the statute. A notice is lawful only

if it is in furtherance of a request which is valid under the TIEA and in compliance with the TIEA. It is clear that the relevant functionaries contemplate the possibility of a challenge to a notice by way of judicial review. Without understanding the factual basis of these Notices, the Claimants say that they are unable to assess the validity and if appropriate challenge their issue on substantive grounds.

- [21] The ITA on the other hand relies on section 9 of the MLA which provides that: “the particulars of and all matters relating to a request shall be treated as confidential”. Section 9 further provides that “no person who is notified of a request...or in any way becomes aware of a request, shall disclose the fact of the receipt of such a request or any of the particulars required or information supplied to any person except in accordance with the Agreement.”
- [22] The ITA further stated that while under Article 8 of the Model TIEA, information relative to the request may be disclosed to the taxpayer, his proxy or to a witness, this does not include communication to third parties notwithstanding that they may be the holder of the requested information.
- [23] Further, having referenced the Global Forum Peer Reviews published by the OECD, the ITA asserts that the TIEA precludes disclosure of information contained in a request and the identity of the requesting state to persons who are the subject of a request for the information.

The Confidentiality – Transparency Divide

- [24] There can be no doubt that there are limitations on the duty to disclose information, for example where questions of national security arise or where the information is inherently or statutorily confidential. A court must always have regard to the particular statutory scheme within which procedural fairness is to operate and the limits which this may imply.
- [25] In the case at bar, the relevant scheme clearly contemplates inter-governmental confidentiality. While requests from foreign governments are generally confidential, the right of confidentiality is by no means absolute. Generally, when making a decision that affects a person’s right or interests, adverse information, even if it is of a confidential or personal nature, may need to be provided to the person affected by the decision. So that the mere fact that a document may contain confidential

information does not dictate that it is not be disclosed either in whole or in part. Even where there may be substantial reasons in favour of preserving the confidentiality of information, the rules of procedural fairness may require disclosure.

[26] However, it is also clear that procedural fairness may not require a decision maker to disclose the precise details of all of the matters upon which he relies as it may be sufficient that the gravamen or substance of the issues are brought to the claimant's attention or that the claimant is on notice of the essential features of the information.

[27] The divide between confidentiality and transparency in decision making within the context of mutual legal assistance has been explored in a number of cases with varying results. Within the Caribbean region, the analysis commences with **Lewis & Ness v Minister of Finance**⁶, a case decided by the Court of Appeal for Bermuda under the 1986 USA – Bermuda Tax Convention Act, as authority for the proposition that a taxpayer or requested party should be entitled to see the foreign government's request upon which the local notice is based, in the interests of basic fairness. At paragraph 55 of the judgment, the Court of Appeal notes the following:

“55. We conclude in relation to the second submission, therefore, that whilst the Act does not expressly require the Minister to produce the request to the person on whom a section 5 notice is served, nevertheless the notice has to include pertinent details of the request, meaning that it must set out relevant parts of the request in detail, including the matters required by section 4 and its definition of the information which the person on whom the notice is served is required to produce.

56. Mr. Kessaram's primary submission is that the requests are confidential intergovernmental documents which Article 6 of the Convention requires to be kept as such. We can assume that the phrase “any matters subject to assistance under Article 5” does include the contents of a request, specifically the nature of the information to which the request relates, and that the Minister is under a general obligation to maintain their confidentiality. But this obligation cannot extend, in the Court's view, to keeping the contents confidential from the person to whom it is intended that a section 5 (1) notice shall be given. The recipient of the notice is entitled to be given “pertinent details” of the contents of the request, and the notice states that the request contains the particulars listed in section 4 (3). The object of the exercise is to inform him of the relevant parts of the contents of the request. They are not to be kept confidential from him.

57. In summary, therefore, the Minister is not required to keep the contents of the request confidential from the recipient of a section 5 notice, to the extent that the contents are

⁶ [2004] Bermuda Law Reports page 66

relevant to the requirements of section 4. The Act does not expressly oblige him to produce the request, but the recipient is told by the notice what the relevant contents are. Without seeing the request, he cannot know whether the Minister's statement is correct, or not.

58. We accept Mr. Elkinson's submission that in these circumstances both fairness and justice require that the recipient should be entitled to see the inter-governmental request, to the extent that its contents are relevant to the question whether the requirements of section 4 were satisfied and, in particular, whether the information required by the notice was identified as such in the request. The inherent jurisdiction of the Court, in our view, permits it to recognize and enforce this right. This is not an order for discovery. The claim in these proceedings, upon analysis, is for judicial review of the Minister's decision to deny the Appellants the right, which we hold that they have, to see the relevant parts of the requests, defined as above."

[28] This Court recognizes that on the facts of that case, the confidentiality argument advanced by the Defendant was defeated because under the 1986 Act, the notice was required to contain the pertinent details of the request. The Court also acknowledges that there is no such requirement under this statutory regime. A similar statutory matrix obtained in a subsequent and more recent decision emanating from Bermuda. In **Bunge Limited v the Minister of Finance**⁷, Bunge applied to the Supreme Court of Bermuda to challenge the Ministry of Finance's decision to issue the notice to deliver up certain tax information, by way of judicial review. Bunge contended that the notice was legally invalid, and sought to have the notice set aside on the basis that the underlying request did not satisfy the statutory requirements of the TIEA and the 2005 Act.

[29] As Bunge had never seen Argentina's underlying request, Bunge made an application to the Court for an order for disclosure by the Ministry of Finance of the underlying Request. It was this disclosure application that the Court ruled upon in its judgment of 13th March 2013, having deferred determination of the substantive judicial review challenge until after the disclosure issue had been resolved. The Ministry of Finance opposed the disclosure application. Counsel argued that the confidentiality provisions of the 2005 Act and the TIEA, as read against the background of the OECDs various publications and guidance notes in this area, prevented it from giving disclosure of Argentinian's confidential request.

⁷ [2013] Supreme Court of Bermuda at page 19 Civ.

- [30] The learned Hellman J accepted Bunge's argument, and confirmed that "both fairness and justice require that the recipient should be entitled to see the inter-governmental request, to the extent that its contents are relevant to the question whether the requirements of section 4 were satisfied and, in particular, whether the information required by the notice was identified as such in the request".
- [31] Counsel for the ITA in this case in submitting that the Court should decline to follow the ratio of the **Bunge** decision advanced a number of points of distinction, none of which were particularly persuasive. Instead, Counsel recommended that the Court follow the Jersey judgment of **Larsen v Comptroller of Taxes**⁸ in which Commissioner Beloff declined to follow the Court in **Bunge Limited**.
- [32] Having heard the submissions of both parties in the matter, this Court is persuaded on the submissions of Counsel for the Claimant that **Re Larsen** is distinguishable and of limited assistance to this Court. The Court is satisfied that particular facts of this case did not require the learned Commissioner to consider the principles of procedural fairness. That case concerned an application for judicial review but the application before Commissioner was an interlocutory one seeking an order for specific disclosure of the request. It is not surprising therefore that the ratio dealt largely with the legal principles which govern disclosure in public law proceedings and the duty of candor. Moreover, it is clear that without conceding any obligation to do so, the Comptroller had in fact disclosed the letter of request. Indeed, it was readily apparent that the reasons for the issue of the Notices were fully and fairly set out in affidavit evidence served on the claimant. It is not surprising therefore that the commissioner concluded that they were sufficiently apprised of the background and the reasons to advance their challenge.
- [33] In my view, the **Re Larsen** judgment is not an outright rejection of the **Bunge** reasoning. Instead, it reflects that well known principle that each case must intimately be decided on its own facts.
- [34] An analysis of the relevant case law both within and without the region, reveals that the courts do not shy away from engaging this balancing act, or from concluding more often than not, that enough information should be disclosed as would permit a claimant to assess whether there is any basis for challenge. The Court notes that in circumstances where the claims for disclosure have been

⁸ [2015] JRC 104

defeated, invariably it occurs within a context where there has been some degree of voluntary disclosure by the relevant agency or alternatively where the Court has found that the claimant would have had sufficient information. See: **Re Larsen; Durant International Corporation v Attorney General and Federal Republic of Brazil [2006] JLR** at page 31 where a summary of the allegations and the relevant dates and sources of the correspondence was provided; **R v (Evans) v Serious Fraud Office [2003] 1 WLR** at page 299 where the Court deemed that sufficient information had been given as to the nature of the criminal investigation.

[35] Moreover, these cases demonstrate that the relevant agencies have, for the most part, arrived at a full appreciation of the fact that some level of disclosure may be necessary having regard to the particular circumstances of the case and the interests of justice and fairness. Indeed in both **R v Home Secretary ex parte Zadari**⁹ and **R v Home Secretary ex parte Abacha**¹⁰ cases relied upon by the ITA, it is apparent that there was disclosure (of the request and of a redacted version of the request) prior to the matters coming to trial.

[36] Of course there is an obvious caution to be applied here. The peculiar context here demands that the proper weight be ascribed to the need for confidentiality. Clearly, the approach adopted by the Bermuda authorities' pre-2001 was unwarranted and disproportionate. Automatic disclosure of such requests are clearly inconsistent to the legislative scheme. This Court is satisfied that that there are very good reasons which support the Defendant's contention that the starting point or default position should be that such requests are to remain confidential. There can be no doubt that indiscriminate disclosure runs the risk that nefarious scoundrels would be able to benefit from early notice of the status of an investigation and through delay tactics frustrate the course of justice. Invariably indiscriminate disclosure could derail confidence in the system of mutual legal assistance thus defeating the ultimate goals.

⁹ [1998] EWHC 305

¹⁰ [2001] ALL ER page 247

[37] In the Court's judgment, the peculiar context here prescribes that inter-governmental requests are confidential and should not be disclosed unless the justice of the case demands it. The Court is not satisfied any such threshold has been satisfied in this case. However, the Court finds that procedural fairness demands that the ITA provide a sufficient level and degree of information to enable representations to be made as to the lawfulness of the Notice or indeed the request.

[38] The Court finds support for this opinion in the dicta of the Royal Court of Jersey in the **Durant** case at paragraph 37:

"As against that, the powers to obtain information (whether under the Fraud Law or the 2001 law) are strong powers which enable private and confidential material to be compulsorily disclosed. The need to investigate criminal conduct must be balanced against the need for justice to be done to those who are the subject of such notices. We note that, in the majority of cases to which we referred, information was in fact disclosed, either by way of disclosure of the letter of request itself, a redacted version, or a summary of its contents. We agree with the approach of the court in *Evans* (9) that the interests of justice can usually be met if when a request is made for disclosure of a letter of request, information is given as to the nature of the investigation and the exact source of the letter of request. We accept that in providing such information the Attorney General will need to have regard to any concerns of the requesting authority as to particularity sensitive parts of the request but, in order to fulfill his duty of fairness, the level and degree of information supplied must be sufficient to enable the subject, if he thinks fit, to make representations on issues such as the lawfulness of the request and the general nature of the alleged offences and investigation in the overseas jurisdiction."

[39] The Court finds even stronger support in the dicta of **The Minister of Finance v AD**¹¹. By the time this case was decided, the statutory regime in Bermuda had changed. Under the International Cooperation (Tax Information Exchange Agreements) Act 2005 and amended by the International Cooperation (Tax Information Exchange Agreements) Amendment Act 2014, a production order must be obtained from a court on the application of the Minister. It follows that there is a judicial filter in place which it is argued should afford adequate protections and assurance that the provisions of the Act had been satisfied. The Court of Appeal made the following important observation:

"I do not accept that he would be adequately protected by the fact that the Minister has considered it appropriate to seek an order and a judge, on the ex parte application, probably (as in this case) without a hearing, has seen fit to grant the order. Either or both may have been misled by the filed documents. Indeed, the requesting authority itself may have been misled by the information upon which it seeks to rely. All this could occur in circumstances in which only the subject of the production order has material which refutes or satisfactorily

¹¹ [2015] Bermuda page 18 Civ

explains the information. An obvious example would be mistaken identity of the subject by the original informant.”

- [40] In circumstances where there is a total absence of appropriate judicial supervision, this increases rather than decreases the need for a procedurally fair and transparent process. The Court was not persuaded by the submission of Counsel for the Defendant that there was sufficient information provided in the Notices by which an individual applying common sense would have gleaned the background and subject of the investigation and inquiry. This Court does not agree. The facts of this case are in no way similar to that which obtained in **Re Larsen** and procedural fairness demands that the Claimants not be relegated to surmise and conjecture.
- [41] The Court is persuaded that the Notices do little to assist the Claimants in assessing the validity of this process. In unchallenged evidence, they indicated their concerns and the Court is satisfied that the fairness requires that they be provided with such information as is necessary to demonstrate that there has been compliance with the statutory framework including the source of the request, the tax period under investigation and a summary of the nature of the investigation and the Court will make the order in those terms by way of mandamus. The ITA is obliged to comply with those terms. The issue of costs remains undetermined as no submissions were made and the Court will hear the Parties on the issue of costs.
- [42] It is apparent that the ITA largely ignored the Claimants’ concerns, instead it resorted to the shield of confidentiality with no apparent regard to the scope of confidentiality actually and specifically necessary in the circumstances of this case and with a cursory allusion to the possibility of *tipping off* made from the bar table. Indeed, the ITA provided no evidence that it contacted that requesting state to positively verify that there was the potential for prejudice to their investigation or whether indeed any concessions could be made on disclosure. This is surprising since it is clear that it is always open to a requesting authority to agree to the disclosure of the letter of request by the ITA or a redacted version thereof as has been done in numerous cases cited. The implacable position adopted was clearly not consistent with the modern day practice.

[43] Finally, during the course of these proceedings the ITA placed significant reliance on several Peer Review Reports. Generally while such tools may provide some limited assistance in interpreting they must be anxiously scrutinized. The old adage “*when you’re a hammer everything looks like a nail*” is *clearly applicable here*. The reality of the focus of the peer review would be apposite to the matters which would concern a court where a claimant alleges that he has not been treated fairly or that his rights have been violated. In arriving at its decision, this Court ascribed limited weight to these reports.

**Vicki Ann Ellis
High Court Judge**

By the Court

Registrar