

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

**IN THE HIGH COURT OF JUSTICE**

**Claim No. BVIHCV 2017/0156**

**IN THE MATTER OF SECTION 9 OF THE MUTUAL LEGAL ASSISTANCE (TAX MATTERS) ACT, 2003  
AND IN THE MATTER OF SECTION 100 OF THE BUSINESS COMPANIES ACT, 2004  
AND IN THE MATTER OF BOWVIEW OVERSEAS LIMITED AND NAVIGATOR FINANCE LIMITED**

**BETWEEN:**

**[1] BOWVIEW OVERSEAS LIMITED**

**[2] NAVIGATOR FINANCE LIMITED**

**Claimants**

**and**

**ALEMAN, CORDERO, GALINDO & LEE TRUST (BVI) LIMITED**

**Defendant**

**and**

**[1] THE INTERNATIONAL TAX AUTHORITY**

**First Interested Party**

**[2] THE REGISTRAR OF CORPORATE AFFAIRS**

**Second Interested Party**

**[3] THE FINANCIAL SERVICES COMMISSION**

**Third Interested Party**

**Appearances:** Mr. Jonathan Addo and Mr. Christopher Pease, Counsel for the Claimants  
Mr. Gerard Clarke and Mr. Gurprit Mattu, Counsel for the Defendant  
Mrs. Kaidia Edwards-Alister, Counsel for the First Interested Party  
Mr. Stephen Grayson and Ms. Dian D. Fahie, Counsel for Second and Third Interested Parties

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**2020: 27<sup>th</sup> February**  
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## JUDGMENT

- [1] **ELLIS J:** On 2<sup>nd</sup> March 2017 the International Tax Authority (“ITA”) issued a notice to produce information, which required the First Claimant to produce copies of documents specified in a schedule to the notice. The schedule indicated that the ‘person or entity of interest’ was the First Claimant, and listed categories of documents that the First Claimant was required to provide to the ITA within ten working days. On 9<sup>th</sup> March 2017 the ITA also issued a notice to produce information, which was addressed to the Second Claimant and required the Second Claimant to produce similar, albeit slightly expanded, categories of documents to those the First Claimant was asked to provide to the ITA.
- [2] The Notices explained that section 5(1) of the Mutual Legal Assistance (Tax Matters) Act<sup>1</sup> (“MLA”) provides that the ITA may, *“for the purpose of complying with a request, by notice in writing, require a person or entity whether acting in an agency or fiduciary capacity, including nominee or trustee, to provide such information as may be specified in the notice, provided that the person or entity is reasonably believed to be in the possession or control of the information to which the notice relates”* (emphasis added). The notices indicated that the Claimants were reasonably believed to be in the possession or control of the information being requested.
- [3] The notices also pointed out that, pursuant to section 5(6) of the MLA, *“a person who, without lawful or reasonable excuse, fails to comply with a notice issued under section 5(1) commits an offence and is liable on summary conviction or conviction on indictment to a fine or imprisonment”*.
- [4] Critically, the notices both referenced section 9 of the MLA and stated as follows:
- “The particulars of, and all matters relating to this notice, including any attachments, are to be treated as confidential in accordance with section 9 of the Act. You may not disclose the fact of the receipt of this notice, or any of the particulars required or documents produced or information supplied, to any other person, except your Attorney without the express written consent of the International Tax Authority, Virgin Islands. Your Attorney is also bound by section 9 of the Act.”

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<sup>1</sup> No. 18 of 2003 of the Laws of the Virgin Islands as amended

- [5] The Defendant is the registered agent for the Claimants and its office serves as the Claimants' registered office. Consequently, when the notices were sent to the Claimants they were also sent to the offices of the Defendant. According to the affidavit of Ayana Liburd the notices were received by the Defendant in sealed envelopes, which the Defendant did not open. Instead, the Defendant forwarded the sealed envelopes to the 'client of record' (i.e. the nominated point of contract) for the Claimants.
- [6] The Claimants subsequently contacted the Defendant and requested that the Defendant send correspondence to the ITA on their behalf, including documents which were intended to comply with the notices. The Defendant sent the documentation relating to the Second Claimants but did not send the documentation relating to the First Claimant.
- [7] After the Claimants had instructed the Defendant to send documentation to the ITA, they subsequently came to the view that the notices were invalid because they did not provide the Claimants with sufficient information regarding the nature and purpose of the request giving rise to the notices. In light of this, the Claimants sought to ascertain precisely what information had been provided to the ITA or to any other tax authorities by the Defendant in its capacity as registered agent for each of the Claimants ("the Requested Material").
- [8] The Defendant has refused to provide the Requested Material to the Claimants. In refusing to provide the same, the Defendant asserted that requests from the ITA, or any regulatory authority, generally contain a statutory mandate to a recipient not to disclose any matters contained within it.
- [9] By letter sent on behalf of the Claimants to the Defendant on 8<sup>th</sup> June 2017, the Claimants advised the Defendant that it is obliged to comply with their requests given that the Defendant is the registered agent of the Claimants and owes them fiduciary duties.
- [10] The Claimants contend that any stipulation within a notice issued by the ITA, or any other regulatory authorities, that the notice must be treated confidentially, would not serve to prevent a registered agent from providing their principal with the information regarding the request in circumstances where the information requested belongs to the principal and/or where the

registered agent is asked to produce such information in its capacity as agent for the principal. They further contended that any confidentiality requirements imposed on registered agents by the terms of a notice issued by the ITA or another regulatory authority cannot serve to prevent a registered agent from notifying their principal of the notice or in how they responded to it on their principal's behalf.

- [11] The Claimants further contend that where a principal is not made aware of the terms of any notice affecting it, it would be deprived of the opportunity to verify its validity and, where necessary, to refuse to provide the information requested if the notice is deemed to be invalid. Given the confidential and highly sensitive nature of the information that is commonly requested under such notices, the Claimants contend that it is critical that a principal be afforded an opportunity to challenge a notice. Moreover, the Claimants contend that their directors are entitled to the material requested in accordance with their rights under section 100 of the BVI Business Companies Act 2004 ("the BCA") which provides them with a right to inspect and take copies of all documents and records of the Claimants.
- [12] In the claim herein, the Claimants seek an order compelling the Defendant to disclose to the Claimants all information and documentation that the Defendant has provided to the ITA and/or any other regulatory authority, in its capacity as registered agent for the Claimants including but not limited to any information and documentation produced to the ITA pursuant to the notices. In the alternative, the Claimants seek an order permitting them to issue a witness summons on a representative of the Defendant.
- [13] The evidence discloses that since the commencement of the proceedings, the Claimants have obtained a copy of the books and records that are held by the Defendant. The books and records were produced pursuant to a request being made under section 100 of the BCA. However, the Claimants contend that the documentation provided does not confirm whether or not the Defendant has provided any further information to the ITA on behalf of the Claimants, other than that which the Claimants instructed the Defendant to provide. They therefore maintain their claims under section 100 of the BCA.

- [14] It follows that the Court must first consider whether section 100 of the BCA has any application on the facts of this case.

**Should the Court make the order sought under section 100 of the BCA?**

- [15] The Claimants seek the disclosure of the Requested Material as part of the documents and records of the Claimant companies, which their directors are entitled to inspect under section 100 of the BCA. That section provides as follows:

**100. Inspection of record**

- 1) A director of a company is entitled, on giving reasonable notice, to inspect the documents and records of the company:
  - a) in written form;
  - b) without charge; and
  - c) at a reasonable time specified by the director;and to make copies of or take extracts from the documents and records.
- 2) Subject to subsection (3), a member of a company is entitled, on giving written notice to the company, to inspect:
  - a) The memorandum and articles;
  - b) The register of members;
  - c) The register of directors; and
  - d) Minutes of meetings and resolutions of members and of those classes of members of which he is a member;and to make copies of or take extracts from the documents and records.
- 3) Subject to the memorandum and articles, the directors may, if they are satisfied that it would be contrary to the company's interests to allow a member to inspect any document, or part of a document, specified in subsection (2) (b), (c) or (d), refuse to permit the member to inspect the document or limit the inspection of the document, including limiting the making of copies or the taking of extracts from the records.

- 4) The directors shall, as soon as reasonably practicable, notify a member of any exercise of their powers under subsection (3).
- 5) Where a company fails or refuses to permit a member to inspect a document or permits a member to inspect a document subject to limitations, that member may apply to the Court for an order that he should be permitted to inspect the document or inspect the document without limitation.
- 6) On an application under subsection (5), the Court may make such order as it considers just.

[16] The Defendant submitted that the Claimant's argument is not maintainable because of the clear definition in section 102 of the BCA, which indicates what is meant by a company's records. Section 102 (1) provides that:

**102. Books, records and common seal**

- (1) A company shall keep
  - (a) minutes of all meetings of
    - (i) directors.
    - (ii) members.
    - (iii) committees of directors, and
    - (iv) committees of members; and
  - (b) copies of all resolutions consented to by
    - (i) directors.
    - (ii) members.
    - (iii) committees of directors, and
    - (iv) committees of members.

[17] Counsel for the Defendant submitted that notices from the ITA, and any answers to such notice, would not fall within any of the categories listed in section 102 (1) of the BCA. Counsel further submitted that in any event, the Defendant has complied properly with the Claimants' directors' request for records under section 100 of the BCA and so there remains nothing to determine as between the Claimants and the Defendant.

[18] The Interested Parties were equally trenchant in their opposition to the Claim. Counsel for the First Interested Party submitted that section 100 cannot be read without first consulting sections 96 and

97 of the BCA as those sections outline the documents that a company is obliged to keep under the Act. The relevant sections provide as follows:

**96. Documents to be kept at office of registered agent**

- 1) A company shall keep the following documents at the office of its registered agent:
  - (a) the memorandum and articles of the company;
  - (b) the register of members maintained in accordance with section 41 or a copy of the register of members;
  - (c) the register of directors maintained under section 118 or a copy of the register of directors; and
  - (d) copies of all notices and other documents filed by the company in the previous ten years.
- 2) Where a company keeps a copy of the register of members or the register of directors at the office of its registered agent, it shall
  - (a) within 15 days of any change in the register, notify the registered agent, in writing, of the change; and
  - (b) provide the registered agent with a written record of the physical address of the place or places at which the original register of members or the original register of directors is kept.
- 3) Where the place at which the original register of members or the original register of directors is changed, the company shall provide the registered agent with the physical address of the new location of the records within fourteen days of the change of location.
  - 3A) The Listed Companies and Funds Regulations may disapply or modify the requirements of this section in relation to listed companies, public funds, private funds and professional funds and, for the purpose of this subsection, public funds, private funds and professional funds have the respective meanings specified in the Securities and Investment Business Act, 2010 [No.2 of 2010].
- 4) A company that contravenes subsection (1), (2) or (3) commits an offence and is liable on summary conviction to a fine of \$10,000.

**97. Other records to be maintained by the company**

1. A company shall keep the following records at the office of its registered agent or at such other place or places, within or outside the Virgin Islands, as the directors may determine:

- (a) minutes of meetings and resolutions of members and of classes of members maintained in accordance with section **102**; and
  - (b) minutes of meetings and resolutions of directors and committees of directors maintained in accordance with section **102**.
2. Where any records specified under section (1) are kept at a place other than at the office of the company's registered agent, the company shall provide the registered agent with a written record of the physical address of the place or places at which the records are kept.
  3. Where the place at which any records specified under subsection (1) is changed, the company shall provide the registered agent with the physical address of the new location of the records within fourteen days of the change of location.
  4. A company that contravenes this section commits an offence and is liable on summary conviction to a fine of \$50,000.

[19] Counsel for the First Interested Party submitted that the combination of these provisions limits the documents that can be inspected by a director to those documents so specified. She noted that those documents fall within the genus of documents generated by the company itself and he Counsel argued that the company documents must be distinguished from a document such as the notice to produce information in this case which is a statutory notice issued by the ITA to the registered agent and subject to a criminal penalty if the registered agent fails to provide the requisite information. Counsel likened such notices to a search warrant issued by a court for the seizure of documents and she relied on **Regina v Inland Revenue Commissions and Another, ex parte T. C. COOMBS & Co.**<sup>2</sup> which illustrated a comparison of the two types of documents and which supported her contention that the objects and purposes are the same.

[20] While they may have a fiduciary relationship with their principals, Counsel for the First Interested Party submitted that registered agents have independent obligations under the AML Laws when conducting business as they are themselves regulated entities which are subject to the laws of the Virgin Islands. Section 98 (6) of the BCA requires a registered agent to request information from the company, including records and underlying documents in respect of a company, when required to do so by the Commission or any other competent authority in the Virgin Islands. Further, section

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<sup>2</sup> (1991) 2 A.C. 283

5 of the Mutual Legal Assistance (Tax Matters) Act, 2003 gives the ITA the power to request information by a notice in writing to any person who is reasonably believed to be in the possession or control of the information to which the notice relates.

- [21] Counsel argued that a notice issued to the registered agent cannot form part of the documents which can be inspected by the directors of a company under section 100 as they do not form part of the company's documents as outlined in the Act. She stressed that section 9 of the MLA prohibits the disclosure of any notice to any third party and a breach of this provision carries a criminal sanction on conviction on indictment.<sup>3</sup> No doubt it is this criminal sanction which informed the Defendant's stance that it cannot confirm whether or not any further information has been provided.
- [22] Counsel reiterated that to adopt a wider definition of the term "documents" under section 100 would ignore the fact that the registered agent is a separate legal entity which has obligations beyond its obligations to its client. The legislation contemplates that registered agents will keep their own documents that may relate to a client in the conduct of their business and in the discharge of its duties under the anti-money laundering and terrorist financing laws and other relevant laws of the Virgin Islands. Counsel reiterated that the company documents that the company keeps at the office of the registered agent are separate and apart from any notice or other request made to the registered agent by a competent authority in the Virgin Islands.
- [23] By order of the Court, the Registrar of Corporate Affairs and the Financial Services Commission intervened as Second and Third Interested Parties in this action. They no doubt sought joinder because the legal issues which arise in this Claim have the potential to indirectly affect their ability to effectively exercise their regulatory functions and the obligations under their respective international cooperation regimes. Counsel for the Registrar and the Commission submitted that the Claimants are not entitled to disclosure by the Defendant of any information and documents that the Defendant may have provided to the Commission or any other BVI regulatory or competent authority in its capacity as registered agent.

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<sup>3</sup> Section 9(2) of the Act prescribes a penalty of a fine not exceeding one hundred thousand dollars to imprisonment for a term not exceeding five years, or both.

- [24] The Second and Third Interested Parties took the ITA's arguments further. Counsel for the Registrar agreed that section 100 of the BCA must be considered in the context of sections 96 to 98 of the Act. In fact, he submitted that Part V, Division 2 of the BCA must be read as a whole, in order to understand and properly apply section 100. If this is done, he argued that it becomes clear that company records for the purposes of a director's power to inspect, are the records which the company itself is required to keep at the office of its registered agent pursuant to sections 96 – 99 of the BCA.
- [25] Counsel further submitted that section 100 provides the mechanism by which a director can inspect a company's records required to be kept and maintained by its registered agent under Part V, Division 2 of the BCA. Whilst there is no definition of "*documents and records of the company*" within Part V, Division 2, it is clear from the context of section 100, that the records which a director is entitled to inspect are those required to be kept by the company's registered agent for the purposes of "*Division 2 Company Records*". Accordingly, the documents to which the director has a right of inspection under section 100 are documents which the company itself is required to provide and maintain with the registered agent and cannot extend to documents which were not provided or required to be maintained by the company under Part V, Division 2.
- [26] Counsel for the Second and Third Interested Parties concluded that the director of a company does not have any right to inspect communications between a registered agent and BVI regulatory or competent authorities. He concurred that with the submissions of the ITA that it would be illogical, and contrary to the public interest to seek to import a wider definition to require a registered agent to disclose to the directors of a company confidential information received from any regulatory or competent authority, acting pursuant to a statutory duty following the receipt of an international cooperation request from a foreign regulatory or law enforcement authority.
- [27] In that regard, he highlighted section 98(6) of the BCA which stipulates that whenever a registered agent is required to do so by the Commission or any other competent authority in the Virgin Islands acting pursuant to the exercise of a power under an enactment, the registered agent shall request from the company, records and underlying documents in respect of the company. He pointed out

that section 32 of the Financial Services Commission Act (“FSCA”) confers on the Commission, the power to request documents and formation from inter alia a registered agent.<sup>4</sup> When a section 32 notice is issued by the Commission to a BVI registered agent requiring the production of information and documents in its possession, which may relate to a BVI company, such a notice does not and cannot form a part of the records, documents and underlying documents of the company, and therefore there can be no right of inspection under section 100 of the BCA. Counsel posited that this would qualify as “protected information” for the purposes of section 49 of the FSCA and the information contained in the notice, and any information and documents disclosed to the Commission in compliance with such notice, could not form part of the section 96 to 98 records of the company to which would be subject to inspection under section 100 BCA. He concluded that the documents to which the director has a right of inspection are documents which the company itself is required to provide and maintain with the registered agent and not to documents which were not provided or required to be maintained by the company.

## **COURT’S ANALYSIS AND CONCLUSION**

### **The Legal Background**

[28] It is now accepted law that a director has a right at common law to “see and take copies of documents belonging to his company” in order that “he might properly perform his duties”. In **Burn v London and South Wales Coal Co and Risca Investment Co.**<sup>5</sup> the claimant brought an action to obtain inspection of and take copies of documents belonging to a company of which he was a director, such documents being in the custody of the solicitor to the company. Counsel on his behalf argued that “a director, in order that he might properly perform his duties, had from the nature of the case a right to see all the documents under the control of his company.” At pages 118 – 119 of the judgment, North J., on the question whether a director has a right to see and take copies of documents belonging to his company, held that he had such right, and that he had such right not at meetings only.

[29] It would appear that North J. accepted the argument of the claimant’s counsel, taking the view that a director had a right at common law to see and take copies of documents belonging to his

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<sup>4</sup> a registered agent is a licensee and therefore falls under section 32(2)(a)(i) of the FSC Act.

<sup>5</sup> (1890) 7 TLR 118

company, in order that he might properly perform his duties. The judgment in **Burn** was applied in **Conway and Others v Petronius Clothing Co Ltd and Others**.<sup>6</sup> In that case, the Court acknowledged that at that time there was no question of directors having any statutory right in this capacity. However, the English Companies Act later expressly prescribed that right. At page 86 (D-H) of judgment Slade J observed:

“In contrast, I think that the legislature, in enacting section 39, presupposed, as was the case, that a director had a right at common law to inspect the books of his company and that accordingly it was not necessary to confer on directors a statutory right of inspection enforceable by civil action; all that was necessary was to provide for criminal sanctions in the event of proper books not being kept or not being made available for inspection to the directors.”

- [30] The Court notes that in the case at bar, the Claimants have invoked only a director’s statutory right of inspection. There is therefore no need to say anything further about the common law right of inspection under or about its scope or interaction with the statutory right.

### **The Statutory Scheme**

- [31] The starting point in understanding a director’s statutory right of inspection is Division 2 of Part V of the BCA titled – Company Records. This Division imposes obligations on a company to keep particular documents and other records at the office of its registered agent. In the case of section 96, these documents are listed in subsection 96(1)(a) – (d) and include: memorandum and articles of the company; the register of members; the register of directors; copies of all notices and other documents filed by the company in the previous ten years. In the case of section 97, the documents include: minutes of meetings and resolutions of members and classes of members; minutes of meetings and resolutions of directors and committees of directors. Finally at section 98 of the BCA, the company is obliged to keep at the office of the registered agent the accounting records (including invoices, contracts and similar documents) of the company for a period of at least 5 years from the date of completion of the transaction to which the accounting records relates or the company terminates the relevant business relationship.

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<sup>6</sup> [1978] 1 WLR 72

- [32] Under these statutory provisions, it is clear that it is the company which is obliged to keep the relevant records. It is the company which has property in the records. It is the company which has physical control of the records or, at the very least, de jure and very often also de facto control of the means by which to assert physical control over the records and ultimately it would be the company's obligation to ensure that these documents and records are held and maintained at the office of its registered agent. Additionally, under sections 96 – 98 it is the company which is liable to the imposition of criminal sanctions if it fails to comply with these statutory obligations.
- [33] The rationale for section 100 of BCA which sets out a director's statutory right to inspect a company's records is clear. Since the law imposes duties on directors to manage a company in the best interests of the company, its shareholders, creditors and other stakeholders (e.g. employees), and in certain circumstances imposes criminal penalties for failure to discharge those duties, it cannot be surprising that the law seeks to give directors access to the information that will enable them to carry out such duties.
- [34] Considered in this statutory context, it is therefore incongruous that a *company* would seek relief under section 100 of the BCA. The entitlement of directors to inspect a company's records stems from the power vested in the board of directors to run the company in conjunction with their duty to exercise care, skill and diligence. Indeed, the case law makes it clear that since the right to inspect only applies in order to enable the director to carry out his duties in exercising its discretion to order access, the court must consider whether the director was seeking the information for an "improper purpose". Indeed, it is also established law that the burden is on the company to show why the director should not be permitted to inspect the company's records.<sup>7</sup> The Court is therefore satisfied that the Claimants herein would not be the proper parties to bring this claim.
- [35] Moreover, even if the Claimants herein had the relevant locus to bring such claims, the Court is not satisfied applying the principles of statutory interpretation that information or documents sought would fall into the category of documents and records to which they would be entitled to have access.

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<sup>7</sup> Oxford Legal Group Ltd v Sibbasbridge Services Plc. [2008] EWCA Civ. 387

[36] Whenever the question arises as to the meaning of a certain provision in a statute, it is proper and legitimate to read that provision in its context. Legal authorities on the interpretation of statutes generally agree that a statute is to be read as a whole and that every clause is to be construed with reference to the other clauses of the act and its context, to the greatest extent possible.<sup>8</sup> In **Attorney General v Prince Ernest Augustus of Hanover**<sup>9</sup> Viscount Simonds put the position in the following terms:

“A question of construction arises when one side submits that a particular provision of an Act covers the facts of the case and the other side submits that it does not. Or it may be agreed it applies, but the difference arises as to its application. It is unreal to proceed as if the court looked first at the provision in dispute without knowing whether it was contained in a Finance Act or a Public Health Act. The title and the general scope of the Act constitute the background of the contest. When a court comes to the Act itself, bearing in mind any relevant extraneous matters, there is, in my opinion, one compelling rule. The whole or any part of the Act may be referred to and relied on.....Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed, detached from its context in the statute: it is to be viewed in connexion with its whole context - meaning by this as well the title and preamble as the purview or enacting part of the statute.”

[37] The words of any statutory provision must therefore be read in the context provided by the statute as a whole. The Court is obliged to examine every word of a statute in its context. Such context will include not only other enacting provisions of the same statute, the existing state of the law, and the mischief which a court can, by those and other legitimate means, discern the statute was intended to remedy.<sup>10</sup> In as much as there may be inaccuracy and inconsistency a court must, if possible ascertain what is the meaning of the instrument taken as a whole in order to give effect to the intention of the legislator.

[38] The provisions of a legislative act should be construed together, and if reasonably possible, the provisions will be harmonized with each other. This Court is therefore obliged to read the provisions of section 100 in the context provided by the Act as a whole. In doing so, the Court is persuaded that the submissions made by Counsel for the Defendant and the Interested Parties have much force. The Court is satisfied that section 100 of the BCA cannot be used to compel the disclosure of correspondence and documents exchanged between a registered agent and the ITA

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<sup>8</sup> Maxwell on Interpretation of Statutes and Driedger on Construction of Statutes

<sup>9</sup> (1957) AC 436, at page 461, 473 and see Maunsell v. Olins (1975) AC 373, at page 386

<sup>10</sup> See: paragraphs 29 – 36

or indeed any other BVI competent authority. In the Court's judgment, such correspondence would not fall into the category of documents which the company would be statutorily required to keep at the office of its registered agent or otherwise.

[39] When the Court has regard to the legislative context, it is clear that a key aim of Division 2 of Part V is to give teeth to the obligation to keep proper documents and records by imposing criminal sanctions in the event that proper records are not being kept and not being made open for inspection by the directors. The Court has no doubt that the Legislature thought it advisable to expressly empower the Court to order the inspection of the documents and records of a company to make it clear and incontrovertible that directors and shareholders would have a right to see and inspect them. The Court is also of the view that in enacting section 100, the Legislature appreciated that an individual director cannot make his full contribution to the management of the corporate business unless given access to the company's books and records. The information contained in these documents and records would be ordinarily requisite to the exercise of the judgment required of directors in the performance of their fiduciary duty, and would be necessary to give a true and fair view of the state of the company's affairs.

[40] A director's statutory right to inspect documents under section 100 arises only in respect of 'documents and records' but it must be such documents and records which the company is obliged to keep Division 2 of Part V of the BCA. The Claimants have submitted that there may be company records which fall outside the categories referred to in sections 96 – 99 of the BC Act and that *"it would be absurd if the directors of the company were somehow prevented from accessing these additional documents from the holder purely because the company is not obliged to keep them"*. This submission ignores the fact that confidential correspondence and notices issued between a registered agent and a competent authority are not the company's records simply because they make reference to a specified company. They may form part of the records of the registered agent or the competent authority but it would lead to an absurd outcome if a definition of *documents and records of the company* for the purposes of section 100 was extended to include a letter or notice neither addressed to or issued to the company but which requires the production of information or documents regarding the company.

[41] In the Court's judgment, the documents and records which would come within these categories would be such as is necessary to give a true and fair view of the state of the company's affairs. The Court can see no justification for expanding the definition of "documents and records" to include correspondence between a competent authority and a custodian of records. Although that correspondence may concern the company, this would not *without more* mean that the correspondence belongs to the company and therefore subject to compulsory disclosure under the BCA.

[42] The Court is therefore satisfied that section 100 of the BCA has no application on the facts of this case. Not surprisingly this position appears to have been somewhat conceded by the Claimants who, in written arguments, submitted that section 100 is of "*marginal relevance to the Claimant's claim/application*"<sup>11</sup> and that "*the section 100 issue will therefore not be determinative of the Claimant's claim whichever way the MLA issue is decided...*".<sup>12</sup>

[43] In the Court's judgment, the conclusions drawn herein are in fact determinative of the Claimants' claim. However, the Claimants have advanced an alternative case in which they appear to invoke the Court's inherent jurisdiction to compel the disclosure of correspondence between the ITA and the Defendant.

#### **Claim for relief under the Court's Inherent Jurisdiction**

[44] The Claimants' alternative case compelled the Parties to address the scope and effect of section 9 of the MLA and the Court determined that this should be treated as a preliminary issue.

[45] In summary, the Claimants contended that the correct interpretation of section 9 of the MLA, cannot and should not operate so as to prevent the subject of the request from knowing of the notice and thereby deprive it of its common law rights in respect of such a notice.

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<sup>11</sup> See paragraph 2 of the Claimant's skeleton submissions

<sup>12</sup> See paragraph 4 of the Claimant's skeleton submissions

[46] Counsel for the Claimants relied on the terms of the explanatory notes to the model Tax Information Exchange Agreement (“TIEA”) and the decision in **Friar Tuck and Another v International Tax Authority**<sup>13</sup> which he submitted revealed three competing interests when a request is made under the TIEA regime:

- a. The need to protect the legitimate interests of the taxpayer by ensuring that information relating to them or their affairs is kept confidential;
- b. The need to protect the legitimate interests of the state requesting the information by providing them with the information sought and, where necessary, keeping confidential their request or certain details relating to it; and
- c. The need to treat the subject of the information request fairly and provide them with sufficient information so that they can determine whether they are under an obligation to comply with any request.

[47] Counsel submitted that it is not surprising that paragraph 94 of the explanatory notes to the model TIEA makes it clear that as a general rule, the confidentiality that applies to TIEA requests is necessary to protect the interests of the taxpayer. He submitted that the rationale stems from that the mere fact that a taxpayer who may be under investigation by a tax authority has the potential to suffer reputational harm if that fact became known to others. Further, if and when information is provided pursuant to the request, that information will invariably be personal, sensitive and of a financial nature. Whilst its disclosure may be justified to allow the assessment of any tax liability, there is no justification for the information becoming more widely available or used for any other purpose.

[48] Counsel concede that paragraph 96 of the explanatory notes to the model TIEA also envisages situations where the requesting state does not want the taxpayer to become aware of certain information contained in the request, or does not want the taxpayer to become aware of the request at all. However, he submitted that this is likely to be the exception rather than the norm. According to Counsel, even if the information request itself is to be kept secret from the taxpayer, it does not follow that the taxpayer should not be provided with certain information about what is being requested, by whom and why. In that regard, he noted that generally speaking, an investigation into a person or entities’ tax affairs is not normally a secret process unknown to that

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<sup>13</sup> BVIHCV 2019/0339 and 0340

person or entity and there will only be limited circumstances in which there is justification for keeping a request secret from the person or entity under investigation.

[49] Counsel invited the Court to conclude, in line with the explanatory notes to model TIEA, that the intention of the confidentiality provision is first and foremost to protect the interests of the taxpayer and to ensure that: (i) the existence of the tax investigation does not become more widely known so as to avoid causing any reputational damage; and (ii) information provided pursuant to the request, which may be personal and/or commercially sensitive, should be kept confidential and not disseminated for purposes other than to allow the requesting state to determine the taxpayer's tax liability.

[50] Counsel for the Claimants reiterated that given that the MLA has been enacted to allow the BVI to comply with its obligations under TIEAs, and that section 9 of the MLA specifically refers to disclosures being permissible if they are in accordance with the relevant TIEA, when interpreting section 9 of the MLA, it is necessary to take into account what confidentiality obligations arise by virtue of the underlying TIEA. With the benefit of the explanatory notes to the model TIEA, he submitted that it is clear that the confidentiality obligations imposed by the model TIEA is intended to protect the legitimate interests of the taxpayer and should not, as a general rule, be used as a tool to withhold information from the taxpayer or from the subjects of the requests. Whilst the model TIEA envisages that a requesting state may have an interest in keeping information secret from the taxpayer, they are to determine, in conjunction with the state receiving the request, how this can be done, subject to fairness requirements.

[51] Counsel for the Claimants then turned to the specific wording of section 9 of the MLA which provides that:-

9. (1) The particulars of and all matters relating to a request shall be treated as confidential, and no person who is notified of a request, or is required to take any action, or supply any information in response to or in relation to any matters to which a request relates or in any way becomes aware of a request, shall disclose the fact of the receipt of such request or any of the particulars required or information supplied to any other person except **in accordance with the Agreement.**

(2) A person who contravenes subsection (1) commits an offence and is liable

- (a) on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding two years or both; or
- (b) on conviction on indictment, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding five years, or both.

[52] Counsel for the Claimants submitted that it follows from this that by allowing disclosures to be made “*in accordance with the Agreement*” (i.e. the TIEA), section 9 of the MLA should not be interpreted as preventing information from being provided to the subject of the request. He contended that it would be absurd to use the confidentiality obligation which is intended to protect the interests of the taxpayer, in a way that effectively prevents a subject of the request being able to determine whether the request is valid and should be complied with (which is also in the interests of the taxpayer). He submitted that to interpret section 9 of the MLA in this way would be to place a registered agent in breach of its fiduciary and contractual duties and would create a lacuna in the MLA which would undermine constitutional safeguards in the regime and frustrate the TIEA regime.

[53] In circumstances where the notice to produce information has been addressed to the ‘entity of interest’, Counsel argued that it can only be assumed that the requesting state and the state receiving the request have not deemed it a case in which the taxpayer should not be notified of the fact of the request itself (because the taxpayer would ascertain this fact when the ‘entity of interest’ receives the notice). As such, he submitted that there would be no further need for confidentiality which would serve to prevent the ‘entity of interest’ or the taxpayer (if they are different) from being provided with the notice to produce, or information provided in response to it.

[54] To the extent any confidentiality does exist regarding information or communications relating to the information request (such as the inter-government correspondence and request made under the TIEA), Counsel submitted that the interest in preserving that confidentiality must be balanced against the interests of fairness of the recipient of the notice to produce information. As such, the requirement of confidentiality is not absolute and the recipient of the notice and the ‘entity of interest’ should be provided sufficient information regarding the TIEA request (if not the request

itself) so that they can assess whether it has been validly made so that a determination can be made as to whether they are in fact obliged to comply.

[55] Counsel submitted the decision in **Friar Tuck** makes clear that notwithstanding any duties of confidentiality that may arise, including the confidentiality that attaches to intra government requests, there remains a need to treat the subject of an information request fairly. This entails providing them with sufficient information regarding the request. He noted that the Court in that case recognised the invidious position the subject of a request would otherwise be put in if it was asked to comply with a request but could not determine whether that request was validly made. Counsel further submitted that TIEAs and the MLA are concerned with a very narrow category of information, namely information relating to tax liability. Whilst there is a threshold requirement of the existence of a bona fide tax investigation, there is no threshold requirement of a prima facie case as to wrongdoing when making a request or compelling disclosure from a subject taxpayer or entity of interest. The notice is part of a wider mechanism where the BVI assists in an information gathering exercise. Accordingly, unless there are specific circumstances which require the TIEA request and/or notice to produce information to be kept secret from the company, section 9 should not be construed as preventing a registered agent from sharing with a company the notice and/or information relating to it.

[56] If section 9 of the MLA were construed in such a way that the addressee of a notice to produce information or the 'entity of interest' named within a notice were not entitled to know of the notice itself or of any information provided pursuant to it, Counsel for the Claimants argued that it would deprive those parties of the ability to lawfully challenge the notice, which would be inconsistent with the principles expressed in **Friar Tuck**. He submitted that there is nothing to suggest that the confidentiality provisions in the model TIEA or at section 9 of the MLA are intended to prevent a subject of the information request from being 'tipped off'. Indeed, not only would this be inconsistent with the practice adopted by the ITA of sending notices to produce information directly to the subject of interest, it would also not provide the subject of the request, the opportunity to determine whether the request is valid and should be complied with, which is required as a matter of law following **Friar Tuck**.

- [57] Taking into account the context in which section 9 of the MLA was enacted the context and manner in which it operates, the Claimants concluded that section 9 is designed to keep confidential from the public, TIEA requests and information relating to them. However, the TIEA regime is utterly dependent upon and can only function if information is passed between: (i) the contracting states to the TIEA; (ii) the subject of the request; and (iii) professional advisors and agents acting on behalf of the subject of the request (i.e. legal representatives and the registered agent). Where in the exceptional situation an additional layer of confidentiality is required, it will be very limited in its scope and be the exception rather than the norm.
- [58] Having considered the scope of section 9 of the MLA, the Claimants then turned to consider the role and obligations of a registered agent. Companies registered in the BVI are at all times required to have a registered agent that is located in the BVI.<sup>14</sup> Registered agents play an important role in providing corporate services and retain certain records belonging to the company, although they are bound to act at the direction of the directors of the company.<sup>15</sup>
- [59] Counsel for the Claimants submitted that registered agents are agents in the true sense of the legal concept as set out in section 91B of the BCA. He submitted that the principal duty of an agent is to obey the lawful instructions of its principal. A registered agent who fails to carry out instructions generally has no right to remuneration, either because, as a result of the failure, a trigger event has not occurred or because there has been a total failure of consideration. In addition, the agent may have liability in damages for breach of contract, on ordinary contractual principles.
- [60] The nature of the duties was summarised by Millett LJ in **Bristol & West Building Society v Mothew**<sup>16</sup>, at paragraph 18:
- “A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not

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<sup>14</sup> Section 91(1) of the BVI Business Companies Act, 2004

<sup>15</sup> See section 91(B) of the BCA

<sup>16</sup> [1998] Ch. 1

place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations.”<sup>17</sup>

- [61] As an agent of the company, a registered agent owes those fiduciary duties that arise from the relationship of principal and agent and this generally includes a duty to act in the best interests of the company. Registered agents must keep certain categories of documents at their offices on behalf of the company for which they provide services. These documents are: (i) the memorandum and articles of the company; (ii) the register of members or a copy thereof; (iii) the register of directors or a copy thereof; and (iv) copies of all notices and other documents filed by the company in the previous ten years.
- [62] If a registered agent is required by the Commission or any other competent authority in the BVI acting pursuant to the exercise of a power under an enactment, the registered agent shall request from the company, records and underlying documentation of the company.<sup>18</sup> Where such a request is made, the company is under an obligation to provide such documentation without delay.<sup>19</sup> The Claimants submit that the interpretation urged by the Defendant leads to absurd results. If the Defendant’s logic is followed, Counsel argued that registered agents would be under a strict obligation to comply with MLA notices but would (on their interpretation) be prevented from seeking instructions in order to determine the validity of a notice.
- [63] However, he submitted that a registered agent cannot adequately discharge its duty to its client without formal consent or instructions from its client. Counsel submitted that if it merely circumvents this requirement to determine validity and acts without instruction, the registered agent compounds its legal jeopardy by acting without authority in seeking to blindly or speculatively comply with the notice and provide documents without assessing whether threshold requirements for disclosure, are met. Those threshold requirements as previously stated require a registered

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<sup>17</sup> For a recent useful survey of the law in this area, see *Conway v Prince Eze* [2018] EWHC 29 (Ch). The High Court review of the law in this area and its application to the facts was confirmed by the Court of Appeal in *Prince Eze v Conway* [2019] EWCA Civ. 88 (06 February 2019).

<sup>18</sup> Section 98 (6) of the BCA

<sup>19</sup> Section 98 (1) (c) of the BCA

agent to be sufficiently informed as to whether they (a) meet the reasonable foreseeability test; and (b) are properly in the possession or control of the requested subject.

[64] There are conceivably two distinct ways in which a registered agent may receive a notice to produce information issued under the MLA:

- a. Where the notice is addressed to a company for whom the registered agent provides a registered office or corporate services and the registered agent receives the notice and/or responds to it at the instruction of the company; or
- b. Where a notice is addressed directly to the registered agent, as an entity that may have control or possession of information sought by the requesting state under a TIEA.

[65] Counsel submitted that where a registered agent has been provided with the notice and/or responded to it at the instruction of the company, it cannot have been the intention of the legislature that confidentiality arising under section 9 of the MLA should prevent the registered agent from providing the company with information regarding the notice. In cases (such as the case at bar) where the company will already be aware (with actual or constructive knowledge through the registered agent) of the notice, it cannot have been intended by the legislation that confidentiality should operate so as to prevent the subject of the request from being informed of the request or notice. Any other conclusion would be nonsensical and would defeat the object of the entire information exchange framework.

[66] The Claimants' analysis amounts to this, if a registered agent is the addressee on a notice and therefore interprets section 9 as requiring it to provide information under an MLA notice, it is under a fiduciary duty to determine whether the notice is valid. It will be unable, from the statutorily minimum records it maintains, to determine the validity of the request. The registered agent would then be unable to comply with its fiduciary duties but also unable to properly respond to the notice placing itself and the client company at serious risk of liability. Counsel argued that this was this is plainly not how the legislation was intended to operate.

[67] Counsel further submitted that as a registered agent is rarely privy to its principal's commercial or financially sensitive information, a registered agent will necessarily be limited in terms of the scope of information it can provide to the ITA thus frustrating the overarching purpose of the TIEA regime.

Accordingly, a registered agent would be expected both by the ITA and by its principal to notify its client of the request and seek the information from the company. According to Counsel this would not constitute tipping off but merely logical compliance with its obligations to the ITA and to its principal.

- [68] He further argued that as a result of its narrow scope of authority, if a registered agent is required to provide information under an MLA notice, under pain of criminal sanction, the risk of noncompliance is unmanageable. In practice, this would lead to a conflict of interests and thereby a breach of its fiduciary duties. Where the registered agent seeks to comply with the notice without the consent of its principal, this would invariably involve a failure to properly scrutinise and where relevant, challenge the validity of the notice. In so doing, the registered agent would fail to safeguard the interests of its principal.
- [69] Taking all of the above factors into account, Counsel submitted that the Legislature cannot have intended section 9 of the MLA to operate so as to prevent a registered agent from informing the principal company of a MLA notice, regardless of whether the notice was sent to the registered agent directly or passed on to it by the principal company. Not only would it largely defeat the utility in the issuing of such a notice (because the registered agent has direct access to very limited information) it would be inconsistent with the finding of the Court in **Friar Tuck** that the subject of the information request is entitled to certain information regarding the request in order to ensure (a) procedural fairness and (b) establish whether there is a legal requirement to provide the information sought. This safeguard would be thwarted by simply addressing the notice to the registered agent.
- [70] The Claimants' alternative case was again trenchantly opposed by the Defendant who invited the Court to consider the scope of the MLA which was introduced to give effect to the Virgin Islands' obligations under TIEAs. Counsel for the Defendant noted that the MLA provides for the implementation in the BVI of various international agreements to which the Government of the BVI is a party, under which requests for information may be made to the ITA by state parties to such agreements. Counsel then referred to section 5 of the MLA which provides that:-

5. (1) The Authority may, for the purposes of complying with a request under the Agreement, by notice in writing, require any person to provide such information as may be specified in the notice, provided that:
  - (1) the person is reasonably believed to have the information to which the notice relates; and
  - (2) the information requested is
    - (i) information held by a bank or other financial institution, or any person acting in an agency or fiduciary capacity, including a nominee or trustee; or
    - (ii) information regarding the beneficial ownership of a company, partnership or other person.
- (2) The power under subsection (1) shall not apply to items subject to legal privilege.
- (3) The Authority may require any information provided pursuant to this section
  - (a) to be provided within such time as is specified in the notice;
  - (b) to be provided in such form as the Authority may require; and
  - (c) to be verified or authenticated in such manner as the Authority may reasonably require.
- (1) The Authority may take copies or extracts of any information produced pursuant to this section.
- (2) Where a person claims a lien on a document, the production of the document pursuant to this section is without prejudice to his lien.
- (3) A person who, without lawful or reasonable excuse, fails to comply with a notice issued to him under subsection (1) commits an offence and is liable on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding two years or both.

[71] He submitted that section 5 of the MLA empowers the ITA, on receipt of such a request, to give notice requiring a person or entity to provide information specified in the notice, provided that the person or entity is reasonably believed to have possession or control of such information. Failure to comply with such a notice without lawful excuse is an offence.

- [72] Counsel for the Defendant recounted the factual background of this case which is for all intents and purposes agreed between the Parties. However, in regard to the subsequent request by the Claimants through their BVI counsel, [wherein they demanded to know whether it had disclosed to the ITA or any other BVI regulatory authority the ownership (beneficial or otherwise) of the Claimant companies or their ownership within a wider group structure; disclosed a group structure chart or any disclosures as to connected group asset holdings; or made any disclosures that might relate directly or indirectly to the identity of the ultimate beneficial owner(s) of the Claimants], the Defendant took the view, and remains of the view, that to answer that request would be impermissible, because of the provisions of section 9 of the MLA.
- [73] Counsel noted that section 9 of the MLA relates both to the fact of the request (the first limb of the prohibition) and to the information required or provided (the second limb of the prohibition). As to the fact of the request, Counsel noted that if the Defendant were to state whether it had or had not disclosed to the ITA the information referred to by Counsel for the Claimants, the Defendant would by implication be revealing whether or not it had received a request under the Act. To put it another way, if the Defendant is asked “have you received a request under the Act”, it is not allowed to answer “yes”, as doing so would contravene section 9 of the Act. According to Counsel for the Defendant, it cannot say “no” either, because if ever it is asked the question again and it does not say “no”, it would be implicitly giving away that it has received a request.
- [74] As to the information required or supplied in response to an ITA request, Counsel again submitted that identifying to the Claimants that such information had been supplied would be a plain breach of the second limb of the prohibition in section 9. The lawful response in these circumstances would be to decline to answer the question. Counsel reiterated that the statutory prohibition in section 9 of the Act is expressed in terms that are clear and absolute. There is no ambiguity in the drafting.
- [75] Counsel for the Defendant took no issue with the decision in **Friar Tuck**. Instead, he submitted that the effect of that decision is that a person or entity that receives a notice under section 5 of the Act, is entitled to ask the ITA for 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 the summary of the nature of the investigation.<sup>20</sup> He submitted that this principle (which is an application of basic fairness) does not alter the plain effect of section 9 as to non-disclosure of a request, its contents, and any answer to it. The limited disclosure provided for by the **Friar Tuck** ruling is disclosure to a person who has received a section 5 Notice, not to a third party.

[76] Finally, Counsel concluded that section 9 upholds an important policy against tipping off. This is a policy recognised as valid by the Court in **Friar Tuck** at page 22 from line 25 to page 23 at line 17 of the decision.

[77] The ITA or the First Interested Party, concurred with the Defendant's position as disclosed in paragraphs 11 and 12 of the affidavit of Ayana Liburd, the executive director of the Defendant, in which she denied that the Defendant is obligated to disclose information concerning whether or not it had in its capacity as registered agent disclosed to the ITA or regulatory authority such information as if would be bound by statute to keep confidential relying on section 9 of the MLA Act.

[78] Counsel for the ITA submitted that the scope of section 9 of the MLA is that it is applicable not only to central authorities but also to any person who is notified of a request, or is required to take an action, or supply any information in response to or in relation to any matters to which a request relates, or in any way becomes aware of a request. That is to say that the requirement of confidentiality in section 9 includes the ITA and the recipients of the Notice, if one was issued. Section 9 operates to prevent any person, including the Defendant from confirming whether or not a notice was received from the ITA and it also prevents the Defendant from providing the Claimants with any information concerning any Notice issued including disclosure of any documents used to satisfy a Notice.

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<sup>20</sup> Friar Tuck Ltd and Quiver Inc v ITA BVIHCV2015/0339 and 0340 (see transcript at page 23 lines 18 – 25, page 24 lines 1 – 2, page 26 lines 22 – 25, and page 27 lines 1 – 9).

[79] Counsel for the ITA submitted that the effect of section 9 of the MLA is that compliance is mandatory and not discretionary. The Defendant has no discretion as to whether or not to confirm or deny any notice from the ITA or to disclose any information concerning any possible notice. Section 9 allows the ITA to issue notices with some level of satisfaction that the information will be kept confidential as non-compliance is backed by criminal sanctions. Conversely, section 8 of the MLA protects persons disclosing confidential information for the purpose of a request. Section 8 (1) provides that:

“A person who divulges any confidential information or makes any statement for the purposes of a request shall be deemed not to commit any offence under any law by reason only of such disclosure or the making of such statement, and such disclosure or statement shall be deemed not to be a breach of any confidential relationship between that person and any other person.”

[80] Similarly section 9 (1) of the International Tax Authority Act, 2018 provides that:

“No proceeding for breach of banking or professional confidentiality may be instituted against any person or against any director or employee of an entity or other legal arrangement who in good faith transmits information or submits reports in accordance with the provisions of this Act or any mutual legal assistance legislation to the Authority.”

[81] Counsel for the ITA reiterated that the receipt of a request or any of the particulars required or information supplied to any other person may only be disclosed in accordance with the relevant TIEA. The model TIEA allows disclosure only to persons or authorities officially concerned with the request including the courts and administrative bodies. It follows that whether or not the ITA had requested information from the Defendant is to be kept confidential and further, any information which may have been disclosed to the ITA in response to a Notice is also to be kept confidential.

[82] Counsel submitted that any decision to the contrary would frustrate the ITA’s ability to effectively issue Notices to Produce Information, as confidentiality plays a vital role in the process. Without confidentiality, she submitted that there is a serious risk of tipping off, undermining and jeopardizing the foreign state’s investigations. In this regard Counsel for the ITA relied on the decision in **Friar Tuck** where at page 23, line 10, the Court observed that:

“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 the confidence in the system of mutual legal assistance thus defeating the ultimate goals.”

[83] Rounding off the submissions in this Claim were the Second and Third Interested Parties, who were intervened for the purposes of opposing the contentions advanced by the Claimants. In the case of the Financial Services Commission ("FSC"), it was pointed out that it also has statutory power to compel the disclosure or production of information and documentation from registered agents. In that regard, the Commission has a personal, though tangential stake in the matters which arise in this Claim.

[84] In the context of international cooperation, Counsel for the FSC submitted that the FSC's obligation to provide cooperation with foreign regulatory or law enforcement authorities is set out at section 33C of the FSC Act which provides that: –

**33C.** 1. Subject to the provisions of this Act, the Commission shall take such steps as it considers appropriate to co-operate with –

- (a) foreign regulatory authorities; or
- (b) a competent authority acting pursuant to an enactment;
- (c) persons, in or outside the Virgin Islands, who have functions in relation to the prevention or detection of financial crime, including money laundering, financing of terrorism, financing of proliferation of weapons of mass destruction, misconduct in, or misuse of information relating to, financial markets and offences involving fraud or dishonesty.

2. Co-operation may include –

- (a) the sharing of documents and information which the Commission is not prevented by this Act or any other enactment from disclosing;
- (b) making requests for assistance to foreign regulatory authorities or a competent authority acting pursuant to an enactment;
- (c) providing assistance to foreign regulatory authorities; and
- (d) making application for the examination of a person by a Magistrate under section

33A or requiring a person to be examined under section 33B save as may be lawfully required by a competent authority acting pursuant to an enactment. (Amended by Acts 10 of 2011 and 8 of 2016)

3. Nothing contained in this section or section 33D shall be construed as compelling the Commission to provide any assistance relating to matters of taxation save as may be lawfully required by a competent authority acting pursuant to an enactment.

[85] In determining whether it should cooperate with an incoming international cooperation request, the FSC has regard to the requirements of section 33D of the FSCA:-

**33D.** 1. Subject to subsection (2), the Commission may, on the written request of a foreign regulatory authority and subject to such conditions as it considers appropriate –

- (a) exercise the power conferred on it by section 32;
  - (b) appoint one or more competent persons as examiners to investigate any matter;
  - (c) make an application for the examination of a person under section 33A or require a person to be examined under section 33B; or
  - (d) disclose information, or provide documentation, to the foreign regulatory authority, whether such information or documentation is already in the Commission's possession or whether it is obtained pursuant to the exercise of a power under paragraph (a), (b) or (c).
2. The Commission shall not exercise the power conferred on it by subsection (1) unless it is of the opinion that the information or documentation to which the request relates, or the investigation is sought, is reasonably required by the foreign regulatory authority for the purposes of its regulatory functions.
    - 2A. Where the Commission considers it appropriate in any case to do so, it may, notwithstanding anything to the contrary contained in this Act, provide a foreign regulatory authority with information in its control or possession, whether or not obtained pursuant to the exercise of any power under this Act, although the information has not been specifically requested by the foreign regulatory authority.
  3. Sections 36 (2) to (5) apply to an examiner appointed under subsection (1) (b).
  4. In deciding whether or not to exercise the powers conferred on it by subsection (1), the Commission may take into account, in particular –
    - (a) whether corresponding assistance would be given to the Commission in the country or territory of the foreign regulatory authority concerned;
    - (b) the nature and seriousness of the matter to which the request for assistance relates, the importance of the assistance to be provided in the

Virgin Islands and whether the assistance can be obtained by other means;

(c) the relevance of the information or documentation to the enquiries to which the request relates; and

(d) whether it is otherwise appropriate in the public interest to provide the assistance sought

5. For the purposes of subsection (4) (a), the Commission may require the foreign overseas regulatory authority making the request to give a written undertaking, in such form as the Commission may require, to provide corresponding assistance to the Commission.
6. If a foreign regulatory authority fails to comply with a requirement of the Commission made under subsection (5), the Commission may refuse to provide the assistance sought by the foreign regulatory authority.
7. Without limiting the discretion of the Commission under this section, the Commission may decide that it will not, on the request of a foreign regulatory authority, exercise its powers under this section unless –
  - (a) the foreign regulatory authority undertakes to make such contribution towards the cost of exercising its powers as the Commission considers appropriate;
  - (b) it is satisfied that the foreign regulatory authority is subject to adequate legal restrictions on further disclosure of the information and documents and that it will not, without the written permission of the Commission obtained at the time of the request or thereafter –
    - (i) disclose information or documents provided to it to any person other than an officer or employee of the foreign regulatory authority engaged in the exercise of its supervisory functions; or
    - (ii) take any action on information or documents provided to it; and
  - (c) it has received satisfactory assurances from the foreign regulatory authority that any information provided to it will not be used in any criminal proceedings against the person furnishing it, other than proceedings for an offence of perjury or any equivalent offence.

[86] If the FSC determines that the requirements of section 33D are satisfied, and that in all the circumstances of the case it is in the public interest to require a registered agent to produce information and documents to the FSC, it may issue a Notice pursuant to section 32 of the FSCA which provides that:-

1. Where the Commission requires for the purpose of –

- (a) discharging its functions;
- (b) ensuring compliance with any financial services legislation; or
- (c) ensuring compliance with a request from a competent authority acting pursuant to an enactment,

the Commission may, by notice in writing given to a person specified in subsection (2), require such person –

- (i) to provide specified information or information of a specified nature or description; or
- (ii) to produce specified documents or documents of a specified nature or description.

2. A notice under subsection (1) –

(a) may be issued to –

- (i) a licensee;
- (ii) a former licensee;
- (iii) a person whom the Commission reasonably believes to be carrying on, or to have at any time carried on, unauthorised financial services business;
- (iv) a person connected with a person specified in sub-paragraphs (i), (ii) or (iii)
- (v) a person (other than a person referred to in sub-paragraphs (i) to (iv)) reasonably believed to have the information or documents to which the notice relates; and (Amended) by Act 8 of 2016)

(b) shall specify the place where and the period within which the information or document is to be provided or produced; and (Amended by Act 19 of 2006)

(c) may require that the information is to be provided to, or the documents are to be produced to, such person as may be specified in the notice. (Inserted by Act 19 of 2006)

3. The Commission may require any information provided pursuant to this section –

- (a) to be provided in such form as the Commission may require; and
- (b) to be verified or authenticated in such manner as it may reasonably require.

4. The Commission may take copies or extracts of any document produced pursuant to this section.
5. Where a person claims a lien on a document, the production of the document pursuant to this section is without prejudice to his or her lien.
6. The reference in subsection (1) and section 33C to “competent authority” means a competent authority or central authority so designated or appointed under an enactment.

[87] Counsel for the FSC relied on section 32 of the FSC Act which confers the power to request documents and formation from *inter alia* a registered agent.<sup>21</sup> When a section 32 notice is issued by the FSC to a registered agent requiring the production of information and documents in its possession, which may relate to a BVI company, Counsel argued that such a notice does not and cannot form a part of the records, documents and underlying documents of the company. It follows that there can be no right of inspection under section 100 of the BCA. The Registrar concurred with these submissions. Counsel also noted that it is instructive that the documents to which the director has a right of inspection are documents which the company itself is required to provide and maintain with the registered agent and not to documents which were not provided or required to be maintained by the company.

[88] Counsel for the FSC informed the Court that pursuant to its statutory duty to cooperate with requests received from foreign regulatory and law enforcement authorities, the FSC has entered into several multilateral memoranda of understanding (“MMoUs”) with foreign regulatory and law enforcement authorities for mutual cooperation in the exchange of information required to enable the respective authorities, including the FSC and the other BVI competent authorities, to perform their regulatory, supervisory and law enforcement functions in the financial services business. Counsel noted that it is an explicit requirement of each treaty and MMoU that confidentiality is maintained by the FSC upon receipt of an incoming international cooperation request from a foreign regulatory or law enforcement authority, both as to the fact of the receipt of the request, its contents (including the identity of the requesting authority and the information and documents

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<sup>21</sup> a registered agent is a licensee and therefore falls under section 32 (2)(a)(i) of the FSC Act.

requested) and any information and documents obtained by the FSC in exercising its power to issue a section 32 Notice to a registered agent.

[89] In securing the confidentiality requirements imposed upon it by the requesting authority, the FSC relies upon both the public interest in preserving the confidentiality of an investigation by a foreign regulatory or law enforcement authority and the confidentiality provisions at sections 49 and 49A of the FSCA. Information may only be provided by the FSC to the requesting authority when the requirements of section 34D of the FSCA are satisfied and the FSC, in considering an incoming request, has close regard to whether the nature and seriousness of the matter to which assistance is requested justifies cooperation. In this regard, cooperation will normally be provided on incoming requests when they relate to “the prevention or detection of financial crime, including money laundering, financing of terrorism, financing of proliferation of weapons of mass destruction, misconduct in, or misuse of information relating to, financial markets and offences involving fraud or dishonesty”.<sup>22</sup>

[90] Counsel submitted that under section 49 of the FSCA, the information contained in the notice, and any information and documents disclosed to the FSC in compliance with the notice, would qualify as “Protected Information” and therefore cannot form part of the section 96 to 98 records of the company to which it relates for the purposes of section 100 BCA. Under section 49 of the FSCA “Protected Information” is defined in the following terms:-

**49. 1.** Subject to section 49A, for the purposes of this section, “protected information” means information which –

- (a) relates to the affairs of the Commission;
- (b) relates to the business or other affairs of any person; and
- (c) is acquired by a person falling within subsection (2), for the purposes of, or in the discharge of, its or his functions under this Act or any financial services legislation, and includes any information that is obtained from a foreign regulatory authority or a law enforcement authority.

**2.** Subsection (1) (c) applies to the following persons –  
(a) the Commission;

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<sup>22</sup> section 33C 1(c) of the FSC Act] and [Second Affidavit, Mr. Baker paragraphs

- (b) a Board Member, including the Managing Director;
- (c) an employee of the Commission;
- (d) a person appointed as an examiner under section 36 or 33C;
- (e) a person appointed as a qualified person under section 36A;
- (f) any other person acting under the authority of the Commission; and
- (g) an employee of a person specified in paragraphs (d) to (j).

3. Information is not protected information –

- (a) if the information is or has been available to the public from any other source; or
- (b) where the information is disclosed in a summary or in statistics expressed in a manner that does not enable the identity of particular persons to whom the information relates to be determined.

4. Subject to section 49A, protected information shall not be disclosed by a recipient of that information, without the consent of –

- (a) the person from whom he or she obtained the information; and
- (b) if different, the person to whom it relates.

[91] Counsel for the FSC then went on to submit that “Protected Information” may only be disclosed to another party if it satisfies any of the gateways for disclosure prescribed under section 49A of the FSCA –

**49A. 1.** Section 49 does not apply to a disclosure –

- (a) required or permitted an order of by a Court of competent jurisdiction in the Virgin Islands;
- (b) required or permitted by this or any other enactment;
- (c) to a law enforcement agency in or outside the Virgin Islands;
- (d) to the Attorney General, Financial Investigation Agency, International Tax Authority and any other tax authority acting pursuant to an enactment;
- (e) to any person for the purpose of discharging any function or exercising any power under this Act or any financial services legislation, in either case whether the function or power is of the person disclosing the information or of the Commission or the Board;

- (f) to a foreign regulatory authority in accordance with section 33C;
  - (g) to the Cabinet;
  - (h) lawfully made to a person with a view to the institution, or for the purpose, of –
    - (i) criminal proceedings;
    - (ii) disciplinary proceedings, whether within or outside the Territory, relating to the discharge by a legal practitioner, auditor, accountant, valuer or actuary of his or her professional duties;
    - (iii) disciplinary proceedings relating to the discharge by a public officer, a member or employee of a statutory board or a Commissioner or employee of the Commission of his duties; or
  - (i) for the purpose of legal proceedings in connection with-
    - (i) the winding up or dissolution of a licensee, a former licensee or a person who has carried on unauthorised financial services business; or
    - (ii) the appointment or duties of a receiver of a licensee, a former licensee or a person who has carried on unauthorised financial services business.
2. The Commission may issue Guidelines concerning the disclosure of information under this section and concerning the disclosure of information in a summary or in statistics as provided for in section 49(3)(b).

[92] The FSC therefore submitted that a company has no automatic right to disclosure. However, this is not to say that the company has no right at all and that confidentiality is appropriate in every case, because to take such an approach would be contrary to the rules of fairness. In applying the public interest, and in imposing a section 49 FSCA confidentiality requirement, the FSC must conduct a balancing exercise in which it weights the need for confidentiality against the requirements of fairness and transparency.

## **COURT'S ANALYSIS AND CONCLUSION**

[93] The Claimants by way of an alternative claim for relief sought to invoke the Court's inherent jurisdiction to order the disclosure of documents and correspondence between the ITA and the

Defendant registered agent. In the seminal article "The Inherent Jurisdiction of the Court", the learned author Sir Jack Jacob<sup>23</sup> defined inherent jurisdiction as the:

"[...] residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them."<sup>24</sup>

- [94] This definition seems to describe an almost limitless concept where a court can and will use its inherent jurisdiction whenever and wherever just and necessary. If there is to be any adherence to the rule of law, no discretion, including judicial discretion can be unlimited. Unfortunately, the Jacob definition provides no indication of any limits or boundaries to the jurisdiction which clearly must exist. This has been reiterated in several English cases, most notably in **Al Rawi v The Security Service**<sup>25</sup> where the Supreme Court observed:

"These (admittedly extreme) examples show that the court's power to regulate its own procedures is subject to certain limitations."

- [95] In that case, the English Supreme Court reiterated that the court's inherent power to regulate its own procedures is not unlimited and made it clear that the power may not be exercised in *contravention* of legislation or rules of court. At paragraph 18 of the judgment, the Court quoted Sir Jack Jacob when he stated "the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision." and concluded that in such a case, the court's power would have been removed by statute and could not be exercised.

- [96] It is clear that a key restriction on the application of inherent jurisdiction is that the doctrine cannot be used to override an existing statute or rule. In **Esparon v Republic**, the Court of Appeal in the Seychelles, applied what it described as:

"The clearest articulation of such restriction is set out in the Supreme Court of Canada decision in **Baxter Student Housing Ltd v College Housing Co-operative Ltd [1976] 2 SCR 475** where the court stated that a court cannot negate the unambiguous expression of legislative will and further held that:

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<sup>23</sup> IH Jacob "The Court's Inherent Jurisdiction" (1970) 23 Current Legal Problems 23

<sup>24</sup>That definition has since been adopted by the English courts in *Grobbelaar v News Group Newspapers Ltd* [2002] 1 WLR 3024 at 3037 per Lord Bingham of Cornhill

<sup>25</sup> [2011] UKSC 34; [2012] 1 AC 531

'Inherent jurisdiction cannot, of course be exercised so as to conflict with statute or rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.'

[97] The Court in **Esparon** also applied the following dictum of Murray CJ in the Irish case of **GMcG v DW (No 2)**<sup>26</sup>:

"Where the jurisdiction of the courts is expressly and completely delineated by statute law it must, at least as a general rule, exclude the exercise by the courts of some other or more extensive jurisdiction of an implied or inherent nature. To hold otherwise would undermine the normative value of the law and create uncertainty concerning the scope of judicial function and finality of court orders."

[98] The case law also makes it clear that even in an area which is not the subject of statute or statutory rules there are limits to the court's inherent jurisdiction. Indeed, the courts have demonstrated a concerted reluctance to extend the scope of inherent jurisdiction to novel circumstances. This general preference for major innovations to be introduced by legislation or by rules of court was illustrated in **Tehrani v Secretary of State for the Home Department**<sup>27</sup>

"When issues are raised as to whether or not a court of law has jurisdiction to deal with a particular matter brought before it, it is necessary to be clear about what is meant by "jurisdiction". In its strict sense the "jurisdiction" of a court refers to the matters that the court is competent to deal with. Courts created by statute are competent to deal with matters that the statute creating them empowered them to deal with. The jurisdiction of these courts may be expressly or impliedly limited by the statute creating them or by rules of court made under statutory authority. Courts whose jurisdiction is not statutory but inherent, too, may have jurisdictional limits imposed on them by rules of court."

[99] It follows from this that in contemplating the exercise of its inherent jurisdiction, a court must carefully consider the relevant factual and legal context of the case. A court must fully appreciate its limitations.

[100] With this in mind, this Court must first consider the context of the case at bar. Here, this Court has concluded that the Claimants claim under section 100 of the BCA is not maintainable. However, the Claimants continue to ask for information and/or documents which clearly do not form any part of the records which a company would be statutorily obliged to keep at the office of its registered agent. It is pellucidly clear that this is not a claim made by directors who are genuinely trying to

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<sup>26</sup> [2000] 4 IR 1 at 26

<sup>27</sup> [2006] UKHL 47 at paragraph [66]

understand the status of the company, its transactions, financial position in order to carry out their duty to act in the companies' best interest. Instead, the Claimants herein seek to have the Defendant disclose communications between itself and the ITA which is a competent authority acting pursuant to its international cooperation obligations under the MLA.

[101] The Claimants submit that they are entitled to such disclosures because the Defendant owes them fiduciary duties which demand that it first determine whether a notice is valid before attempting to comply with its terms. In order to do so, the Claimants contend that the Defendant is obliged to disclose the fact of the notice and seek authorization and/or instructions from its principal.

[102] The relationship between a company and its registered agent may indeed be a fiduciary one. However, at common law, a registered agent acts as fiduciary with respect to the matters *within the scope of the agency* which, in this context, would include the obligation to ensure the safe custody and maintenance of the memorandum and articles of association, the register of members, the register of directors, copies of all resolutions, notices and filings, etc.. It is also the duty of the registered agent to keep these documents up-to-date and available for inspection by the directors and shareholders of the company. The Court is also aware that under the BCA, the registered address is also the legal address of a company and they are the keeper of the common seal of the agent's company.

[103] However, the registered agent's duties have a context which goes beyond the common law and is peculiarly statutory in nature. Section 5A of the MLA imposes on a company the obligation to keep and maintain certain records notwithstanding anything to the contrary contained in any other enactment. That section provides that:

5A. (1) For the purposes of achieving the objectives of the requirements of section 5 and notwithstanding anything to the contrary contained in any other enactment, every company shall, in addition to any records required to be kept or maintained under the BVI Business Companies Act, 2004 or any other enactment,

(a) keep at the office of its registered agent or at such other place or places, within or outside the Virgin Islands, as the directors may determine, the records and underlying documentation of the company; and

- (b) retain the records and underlying documentation for a period of at least five years from the date
    - (i) of completion of the transaction to which the records and underlying documentation relate; or (ii) the company terminates the business relationship to which the records and underlying documentation relate.
- (2) Where the records and underlying documentation of a company are kept at a place other than at the office of the company's registered agent, the company shall provide the registered agent with a written record of the physical address of the place or places at which the records and underlying documentation are kept.
- (3) Where the place at which the records and underlying documentation of the company changes, the company shall provide its registered agent with the physical address of the new location of the records and underlying documentation within fourteen days of the change of the location.
- (4) The records and underlying documentation of the company shall be in such form as
  - (a) are sufficient to show and explain the company's transactions; and
  - (b) will, at any time, enable the financial position of the company to be determined with reasonable accuracy.
- (5) For the purposes of this section,
  - (a) "business relationship" means a continuing arrangement between a company and one or more persons with whom the company engages in business, whether on a one-off, regular, habitual or regular basis;
  - (b) "company" has the meaning specified in section 3 of the BVI Business Companies Act, 2004, and includes "foreign company" as defined in that section; and
  - (c) "records and underlying documentation" includes accounts in relation to (i) all sums of money received and expended by the company and the (c) and expenditure takes place; (ii) all sales and purchases of goods by the company; and (iii) the assets and liabilities of the company."

[104] Critically, in 2015, the BVI Legislature specifically amended section 5 of the MLA<sup>28</sup> making it clear that the ITA has power to require persons or entities *acting in an agency or fiduciary capacity* to provide such information as may be requested in a notice. Section 5 now provides that:-

- 5. (1) The Authority may, for the purposes of complying with a request under the Agreement, by notice in writing, require a person or entity whether acting in an

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<sup>28</sup> Section 4 of the Mutual Legal Assistance (Tax Matters) (Amendment) (No. 2) Act No. 17 of 2015

agency or fiduciary capacity, including a nominee or trustee, to provide such information as may be specified in the notice, provided that the person or entity is reasonably believed to be in the possession or control of the information to which the notice relates.

[105] Section 5 of the MLA then goes on to criminalize noncompliance where there is no lawful or reasonable excuse. Conversely, the Legislature has afforded statutory protection for persons or entities which are compelled to comply. Section 8 of the MLA, which assures this protection, makes it clear that any disclosure made in compliance with this statute, would not be a breach of any confidential relationship which may exist between a fiduciary and its principal. Critically, subsection 8 (2) also prevents anyone (including presumably a principal) from commencing any civil claim or action against a person who has made such disclosure. Section 8 provides as follows:

- (1) A person who divulges any confidential information or makes any statement for the purposes of a request shall be deemed not to commit any offence under any law by reason only of such disclosure or the making of such statement, and such disclosure or statement shall be deemed not to be a breach of any confidential relationship between that person and any other person.
- (2) **No civil claim or action whatsoever shall lie against a person who makes a disclosure or statement referred to in subsection (1) or against such person's principal or employer by reason of such disclosure or statement.**  
Emphasis mine

[106] Notwithstanding its fiduciary relationship with its principal, it is clear that a registered agent has important statutory obligations which in their own right demand compliance and which proscribes non-compliance at significant cost. The Virgin Islands Legislature then reinforced that premium by excluding the possibility of any legal challenge **whatsoever**. It is therefore doubtful whether (on this basis alone), this Claim can properly be maintained.

[107] Under section 9 of the Act, the particulars of and all matters relating to a request are to be treated as confidential, and no person who is notified of a request, or is required to take any action, or supply any information in response to or in relation to any matters to which a request relates or in any way becomes aware of a request, shall disclose the fact of the receipt of such request or any of the particulars required or information supplied to any other person except in accordance with the Agreement. In the Court's judgment this is clear and unequivocal language. In the event that a

third party would wish to disgorge the obligation of confidentiality, they would need to advance an appropriate basis.

- [108] The Claimants in this case ask the Court to order disclosure or inspection on the basis that the confidentiality provisions are intended to protect the taxpayer. They rely on the explanatory notes to Article 8 of the Organization for Economic Cooperation and Development (“OECD”) model TIEA which sets out the confidentiality provisions. In the BVI the equivalent provision reads as follows:

“All information provided and received by the competent authorities of the Contracting Parties shall be kept confidential and may be disclosed only to persons or authorities (including courts and administrative bodies and, in the case of the British Virgin Islands, a select committee of the House of Assembly) officially concerned with the purposes specified in Article 1, and used by such persons or authorities only for such purposes or for oversight purposes, including the determination of any appeal. For these purposes, information may be disclosed in public court proceedings or in judicial proceedings. 2. The information may not be disclosed to any other person or entity or authority without the express written consent of the competent authority of the Requested Party. 3. Information provided to a Requesting Party shall not be disclosed to any other jurisdiction.”

- [109] This Court takes not issue with the OECD explanatory notes which makes it clear that the respect for the confidentiality of information is a corollary of the powers of tax authorities and is necessary to protect the legitimate interests of taxpayers. Clearly, mutual assistance between tax authorities is therefore feasible only if each administration is assured that the other administration will treat with proper confidence the information which it obtains in the course of their co-operation. No doubt this is to ensure consistency with the right to privacy which is acknowledged in numerous human rights instruments. As a result, it is contemplated that contracting states must ensure that adequate protection is provided to information received from another Contracting Party. The OECD advocates that exchange of information for tax matters must always be coupled with stringent safeguards to ensure that the information is used only for the purposes specified in Article 1 of the Agreement. Respect for the confidentiality of information is necessary to protect the legitimate interests of taxpayers. And so, as between the contracting states, the model agreement prescribes that any information received pursuant to this Agreement by a contracting party must be treated as confidential.

[110] The explanatory notes go on to state that the information may be disclosed only to persons and authorities involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to taxes covered by the Agreement. What is clear is that the obligation of confidentiality/secretcy which exists between the contracting states would not inform a corresponding obligation on the Defendant to provide details of the notice and the communication which it would have had with the ITA. Indeed, as the recipient of the notice the Defendant cannot ignore the clear, unambiguous and strict provisions of section 9 of the MLA. So that while the information may be disclosed by the contracting states to persons and authorities involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to taxes covered by the Agreement and while this may also include the taxpayer, his proxy or to a witness, it is not the case that person or entities who are the recipients of the notice or request are at liberty to flout the clear provisions of the MLA and disclose the notice or indeed any communications with the competent authority.

[111] The explanatory notes make it clear that reconsideration of the confidentiality requirements under the Agreement is a matter for the relevant authorities and not the recipient of a notice. Paragraph 96 of the Notes provides that:

“The competent authorities concerned should discuss such cases with a view to finding a mutually acceptable mechanism for addressing them. The competent authorities of the applicant Party need no authorisation, consent or other form of approval for the provision of the information received to any of the persons or authorities identified.”

[112] Moreover, the explanatory notes go on to state that although the model TIEA may *permit the disclosure* of the information to the relevant taxpayer; it does *not require disclosure* of the information to the taxpayer.<sup>29</sup> In fact, it recognizes that there may be cases in which information is given in confidence to the requested party and the source of the information may have a legitimate interest in not disclosing it to the taxpayer. Such legitimate interests were alluded to in **Friar Tuck** where the Court made the following observation:

“[...]there are very good reasons which support the Defendant’s contention that starting point or default position should be that such request 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

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<sup>29</sup> Paragraph 96 of the Explanatory Notes to the OECD Model TIEA

frustrate the course of justice. Invariably indiscriminate disclosure could derail confidence in the system of mutual legal assistance thus defeating the ultimate goals.”

[113] The concern is perhaps best illustrated in a line of judicial review cases where courts have considered the issue of *locus standi* of the subject matter of a request. In **R. v. Director of the Serious Fraud Office ex p. Johnson**<sup>30</sup> the applicant who had been charged with fraud sought leave to apply for judicial review of the issue (by the Director of the Serious Fraud Office) of a notice under section 2(2) of the Criminal Justice Act 1987, requiring his wife to answer questions or otherwise furnish information with respect to matters arising out the investigation against the applicant. The Court concluded that the applicant, who would in any event have failed on the merits of the application, did not have locus standi to apply for judicial review. Auld J. in **ex p. Johnson** observed inter alia that the notice had not been served on the applicant and that no requirements of him were made under it. Having regard to these factors he concluded that there was no basis in law for saying that the applicant and his wife have a mutuality of interest in the application and thus he had no standing.

[114] In a similar case, **R v Manchester Crown Court ex p. Taylor**<sup>31</sup>, the applicant sought an order of certiorari to quash the order of the Recorder which required various banks to give the police access to certain material including accounts, ledgers and business records relating to the applicant and four other named companies. The relevant statute under which this order was made set out a number of procedural safeguards (factors with which the Judge must first satisfy himself prior to exercising his discretion to issue the order) the purpose of which was to protect the person or body against whom the order is sought. After examining the authorities, Court noted (at page 719) that “in all the reported cases on these provisions....the objections which was made was by persons on whom notice was served and the persons who were going to have to produce the material.” And that the safeguard provisions “are designed to protect such persons and not the person suspected of crime.” Although the case was decided on another ground, Glidewell L.J. was of the view (page 720) that it would have been a wrong exercise of the Court’s discretion to grant any relief to the applicant.<sup>32</sup>

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<sup>30</sup> 1993 C.O.D. 58

<sup>31</sup> 1988 1 W.L.R. 705

<sup>32</sup> The ratio for this view may be found in the judgment of Watkins L.J. in **R v Leicester Crown Court ex p. D.P.P.** 1987 1 W.L.R. 1371, with which Glidewell L.J. whole – heartedly agreed. (See: page 716)

- [115] Closer to home, in the Cayman Islands, the case of **Bertolli v Malone**<sup>33</sup> is also instructive. In that matter, the Appellants sought declarations that they were entitled to be heard by the Cayman Mutual Legal Assistance Authority on a request by U.S. Authorities for legal assistance with respect to criminal proceedings instituted against them in the United States. The Court of Appeal observed in that case, that the purpose of the Mutual Legal Assistance (United States of America) Law 1986 and the Mutual Legal Assistance Treaty was to speed up the process involved in the investigation, prosecution and suppression of crime between the two countries and in the circumstances the principles of natural justice could not be meant to be applied as rigid rules to frustrate the intent of the Legislature.
- [116] The Court concluded that the Legislature had not provided that the person in respect of whom the information is sought should be heard and in the circumstances there would appear to be no necessity based on the demands of fairness that the Courts should supplement the legislative requirements by imputing a requirement that the Authority should decide whether such a person should be heard or not. Georges J.A. concluded that the Appellants could not be parties to the determination as to whether the assistance should be granted or denied under the Mutual Legal Assistance (United States of America) Law and Treaty and as a consequence, the Authority was under no obligation to consider whether they should be heard.
- [117] **Bertolli v Malone** was appealed to the Privy Council, and in the judgment delivered on 22<sup>nd</sup> April 1991<sup>34</sup>, their Lordships wholly adopted the reasoning of Georges JA. The Board held that the respondent was under a duty to act fairly. In order to decide what procedural fairness required in this case it was necessary to examine the Mutual Legal Assistance (United States of America) Law 1986 and Treaty of Mutual Legal Assistance 1986. The Board noted that the Law and Treaty were designed to provide speedier machinery for the investigation, prosecution and suppression of crime. The demands of law enforcement were intended to override the duty of confidentiality. The Law and Treaty, in particular art 3(2), did not provide that the person in respect of whom the information was sought ought to be heard, which was understandable as the Treaty may be used at an investigatory stage when it would be undesirable for the suspect to be notified of the

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<sup>33</sup> [1990] CILR 58

<sup>34</sup> [1991] UKPC 17; [1992] LRC (Const) 960

investigation and afforded the opportunity to destroy evidence. The appellants were not party to the decision as to granting assistance. The Cayman Mutual Legal assistance Authority was held to be under no obligation to consider whether to hear a party who was the subject of a mutual assistance request under the Mutual Legal Assistance ( USA) Law 1986 which had been properly construed as granting that Authority the power to gather and produce confidential information.

[118] While the case at bar is not concerned with the issue of *locus standi*, these authorities clearly demonstrate the regard which courts have had for the demands of law enforcement in the context of international cooperation. However, there are important principles which can be extrapolated and applied to the facts of this case. Counsel for the Claimants has argued that an investigation into an individual's tax affairs is not normally a secret process unknown to the person of entity and he submitted that only limited circumstances would there be a need to keep a request secret from the person or entity under investigation. Obviously, this would depend on the facts of each individual case and no doubt on the stage of the investigation. What is clear to this Court is that such determination cannot properly be assessed by a registered agent.

[119] The ability to provide effective international cooperation is not an optional feature of a proper financial services regulatory regime, but an essential requirement. The peculiar context here prescribes that mutual legal assistance requests are confidential and should not be disclosed unless the justice of the case demands it. In **Friar Tuck**, this Court wholeheartedly acknowledged that while requests from foreign agencies are generally confidential, the right of confidentiality is by no means absolute. There is an obvious balancing exercise which must be applied. The interest of confidentiality must be balanced against the need to ensure procedural fairness, and a cursory 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. Modern case law has consistently held that procedural fairness demands that competent authorities such as the ITA and the FSC 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.

[120] However, this would not permit a taxpayer/person or entity of interest to seek to compel the disclosure of information from its agent in breach of the clear and unambiguous terms of the

relevant statute. Unlike the judicial authorities relied on by the Parties herein, the Claimants have not sought to invoke the Court's supervisory jurisdiction under ECSC CPR Part 56. They have not sought to take legal action against the ITA, but have instead commenced a private law claim seeking relief as against their fiduciary. It seems to the Court that the Claimants' claim for relief would effectively enable a tax payer or third party to access through the proverbial "back door" that which it is not willing to advance through a direct demand/legal challenge to the ITA or other competent authority.

[121] The Court has considered the provisions of Article 7 of the model TIEA and the relevant Commentary at paragraphs 71 – 93 which clearly outlines the limited basis upon which a requested party may decline a request. Counsel for the Claimants has not satisfied this Court that these are matters which cannot be fully tested at the instance of a registered agent. Instead, he submitted that the overarching purpose of the TIEA regime may be frustrated due to the limited scope of the information actually controlled by the registered agent because a registered agent is rarely privy to its principal's commercial or financially sensitive information. In the Court judgment, this argument does not assist the Claimants. Plainly, a registered agent can only disclose information which is in its possession or control.<sup>35</sup> Section 5A provides an indication of the information and documents which the agent would be compelled by law to keep and maintain. To the extent that any further information or documentation may be requested, section 98 (6) of the BCA provides that when required to do so by the FSC or any other competent authority, a registered agent shall request information from the company, including records and underlying documents in respect of a company.

[122] Although the Second and Third Intervening Parties in this case are not directly affected by these proceedings, the Court is satisfied that the matters raised in this Claim also have the potential to impact their regulatory functions. Under the FSCA, registered agents are licensed by the FSC and are subject to its regulatory oversight under various laws and regulations, including the Regulatory Code and the Anti-Money Laundering and Terrorist Financing Code of Practice. Under the Anti-Money Laundering Regulations 2008 (as amended), a company must provide its registered agent with certain know-your-client compliance information about its directors, members, controlling

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<sup>35</sup> Section 5 (1) (a) of the MLA

owners and ultimate beneficial owners. The registered agent must receive compliance information on at least two of the company's directors (or the sole director, if applicable) and all individual or corporate shareholders that hold 10 per cent (or more) of the shares issued by the company. A company must provide its registered agent with updated compliance documents every three years and/or when there are any relevant changes to its register of directors and members.

[123] A registered agent may well be in a fiduciary relationship with its principal but again that is not the complete picture. There are concomitant obligations which statute also prescribes. For example, as a regulated entity under the FSCA a registered agent of a company regulated by the FSC is required to notify the Commission under section 54A of the FSCA if it becomes aware that such regulated company for which it acts as agent commits a breach or an offence under the FSCA or other financial services legislation. Further, where a registered agent becomes aware of a breach of section 98 of the BCA by a regulated company, it is obliged to notify the Commission under section 54A of the FSC Act.

[124] The FSC has similar powers under the FSCA to issue notices to registered agents requiring the production of information. A similar balancing exercise must be conducted where the recipient of the notice seeks disclosure of the request. The Court finds much force in the arguments advanced by Counsel for the Registrar and the FSC that a person's legitimate expectation of being treated fairly is not undermined when the FSC imposes a requirement of confidentiality on a registered agent to whom a section 32 Notice is issued. Counsel advanced the following reasons in support of this contention:

- “ (i) the receipt of the incoming request from a foreign regulatory or law enforcement authority, and the action by the FSC in determining whether to issue a Notice to Disclose Information, are essentially an information-gathering exercise that may assist the requesting authority in determining whether further action is justified and, if so, against whom.
- (ii) the disclosure of non-public information to a foreign regulatory or law enforcement authority is not determinative of any of the issues regarding any alleged regulatory or criminal misconduct. Those issues are addressed at a later stage when the legal rights of any persons suspected of regulatory or criminal misconduct in the matters being investigated to respond and to make representations are engaged. It is at this later stage that the rights of suspects in a criminal investigation, including a person's legitimate expectation of being treated fairly in the investigation, their right to know the case alleged against them, their right respond

and to make representations, their right to legal representation and to a fair trial process are engaged.

- (iii) if the information provided by the FSC to a foreign regulatory or law enforcement authority is considered by that authority to be relevant and probative to matters being investigated, before the information can be adduced in evidence in criminal proceedings, it will be the subject of a 'mutual legal assistance in criminal proceedings request' between the respective central authorities of the BVI and the requesting jurisdiction in accordance with the relevant laws requiring mutual cooperation in criminal proceedings. Under the express limitations imposed by the FSC on the use of the disclosed information, the information disclosed to a foreign regulatory or law enforcement authority following receipt of an incoming international cooperation request cannot form the basis of any factual finding or determination in criminal proceedings.
- (iv) in considering an incoming request from a foreign regulatory or law enforcement authority, and in exercising its statutory powers, the FSC is guided by the requirement for procedural fairness, particularly since a company which is the subject of a request will not be aware of the fact that it is under investigation. In addition to considering the requirements of section 34D of the FSCA [**Provision of assistance to foreign regulatory authorities**] the FSC ensures procedural fairness by giving consideration to whether the public interest, and the interests of justice, may exceptionally require that the officers of a company should be made aware of the fact of a request, and the information which is being provided to the requesting authority. In such cases, the FSC will refer back to the requesting authority for permission to disclose relevant before proceeding with a request and may determine not to proceed with issuing a section 32 Notice if permission is not granted."

[125] Whilst there may be circumstances where procedural fairness requires a company to be provided with notice that a registered agent has been required to produce documents and information relating to the company, this Court concurs that this should not be interpreted as importing an artificial definition of section 100 "*documents and records of the company*" to include a notice (or consequential communications) received by a registered agent which concerns a client company but which is not addressed to the company. There may well be circumstances where procedural fairness requires a company to be informed of the fact that a notice has been issued to its registered agent, however, in the Court's judgment such disclosure, if it must occur, it should be at the instance of and with the approval or direction of the relevant competent authority or if expressly permitted by statute or by court order.

[126] In any event, bearing in mind that its limitations, the Court is satisfied that this is not an appropriate case to exercise its inherent jurisdiction to compel the Defendant to provide the information sought. Certainly, the Court is not satisfied that the witness summons procedure provided for under CPR Part 33 would be applicable in this case.

[127] Of course, the peculiar facts of this case are not lost on this Court. From all accounts the Claimants were in fact made aware of the notices and in fact authorized the release of documents and information requested. In these circumstances, it would seem odd to engage in costly litigation to solicit that which one had expressly authorized; but that is not the end of matter. The Claimants now seek to have details of any disclosures made to the ITA or any other tax authorities by the Defendant in its capacity as registered agent. This is a broader line of inquiry which would require the Defendant to reveal whether it has itself received a section 5 notice or indeed a similar notice from another competent authority and if so, to disclose what, if any, response was made thereto. For the reasons which are set out herein, the Court is satisfied that this would be inappropriate on the facts of this case.

## **COSTS**

[128] Counsel for the Claimants and the Interested Parties are agreed that as between themselves the matter will be cost neutral and so the Court will make no order as to costs as between the Claimant and the Interested Parties. As between the Claimant and the Defendant, the Court will order that written submissions be filed.

[129] Accordingly, the Court's Order is as follows:

- i. **The Claimants' Fixed Date Claim Form is dismissed.**
- ii. **The Defendant will lodge written submissions on costs within 14 days of this Order.**
- iii. **The Claimants will lodge written submissions in Reply within 14 days thereafter.**

**Vicki Ann Ellis  
High Court Judge**

**By the Court**

**Registrar**