IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN

Cause No: G391/2012

BETWEEN:

1. **M.H. INVESTMENTS**
2. **J.A. INVESTMENTS**
3. ~~**BYWATER INVESTMENTS LIMITED**~~

APPLICANTS

AND:

1. **THE CAYMAN ISLANDS TAX INFORMATION AUTHORITY (CITIA)**
2. ~~**THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS**~~

RESPONDENTS

Appearances: **Mr. Tom Lowe Q.C. instructed by Mr. Sam Dawson of Solomon Harris on behalf of the First and Second Applicants**

The Honourable Attorney General Mr. Samuel Bulgin Q.C. with Ms. Dawn Lewis of the Attorney General's Chambers on behalf of the First Respondent

Before: **The Hon. Mr. Justice Charles Quin**

Heard: **24th January 2013**

JUDGMENT

CONTENTS AND PARAGRAPHS

PREAMBLE

On the 18th September 2012 the Applicants filed an application for leave to apply for Judicial Review. On the 2nd November 2012, the Applicants filed an Amended application for Judicial Review which I set out below.

BACKGROUND TO RELEVANT LEGISLATION
AS SET OUT IN THE APPLICANTS' O.53 APPLICATION

1. The Government of the Cayman Islands has entered into a number of agreements with the governments of other jurisdictions for the exchange of information relevant to the administration and enforcement of domestic tax laws.

2. The legislation in the Cayman Islands which governs the implementation of the various tax information sharing agreements is the Tax Information Authority ("TIA") Law and the entity which implements the TIA Law pursuant to s.5 thereof is the Cayman Islands Tax Information Authority ("CITIA")

3. By agreement dated the 30th March 2010 the Governments of the Cayman Islands and Australia entered into a tax information sharing agreement (the "Australian Tax Agreement").

4. The terms of the Australian Tax Agreement were incorporated into the laws of the Cayman Islands pursuant to the TIA Agreements No. 2 Order 2010 which was affirmed by the Legislative Assembly on the 4th day of September 2010 by Government Motion No. 7/2010. The terms of the Australian Tax Agreement are incorporated as the 16th schedule to the TIA Law ("Schedule 16")

5. Under Schedule 16 Article 5 of the TIA Law, the Australian Taxation Authority was required, when making a request for information, in order to demonstrate the foreseeable relevance of the information requested, to provide a statement of the information sought, an explanation or description of the tax purpose for which the information was sought, and, a statement that the Australian Tax Authority had pursued all means available in its own territory to obtain information.

6. Upon receipt of a Request from the Australian Tax Authority, s. 7(1) of the TIA Law required CITIA to determine whether the request was in compliance with Schedule 16 of the TIA Law and, if so, to execute the request in accordance with the TIA Law.

7. Under s.8(4) of the TIA Law (as applied in the case of a request under Schedule 16):

i. CITIA has to apply to a judge of the Grand Court for an order for production in circumstances when it considers it necessary to obtain the information specified in a request by the Australian Tax Authority if that information is required for proceedings or related investigations in Australia.

ii. Only when the request was not being made for any proceedings or related investigations could CITIA itself simply serve a notice without application to the Court.

8. A Judge hearing an application by CITIA for a production order has a discretion to make an order if the conditions in s.8(7) of the TIA Law are satisfied, including the absence of any reasonable grounds for not granting the request, pursuant to the TIA Law and, in this case, Schedule 16.

9. The requirement to apply to a judge under s.8(4)(a) of the TIA Law is an essential safeguard for a person affected by the Request for information to ensure that his rights of privacy and confidentiality are not unfairly prejudiced.

10. CITIA should inform the person affected of an application to the Grand Court in ordinary circumstances so that such person might be heard and make representations.

11. In a case where the CITIA does not strictly observe the procedure for executing a Request it procures an unlawful violation of the Confidential Relationships (Preservation) Law (2009 Revision) ("CRPL") and the person producing documents is also in contravention of CRPL and without statutory authority or other protection under the TIA.

BACKGROUND TO REQUEST BY THE AUSTRALIAN TAX AUTHORITY PURSUANT TO THE AUSTRALIAN TAX AGREEMENT AS SET OUT IN THE O.53 APPLICATION

12. The Applicants, MH Investments and JA Investments Ltd. are companies incorporated and registered in the Cayman Islands (the "Cayman Companies").

13. The Applicant Bywater Investments Limited is a company incorporated and registered in the Bahamas ("Bywater").

14. Bywater and four other entities (the "Appellants") are the subject of proceedings currently before the Australian Courts related to tax assessments made against them by the Australian Tax Authority.

15. The Australian Tax Proceedings were commenced on or about the 12th August 2010.

16. On or about the 20th June 2012 an affidavit of the Australian Tax Authority filed in the Australian Tax Authority was served on the Appellants. This affidavit indicated that the Australian Tax Authority had been provided with certain documents that belonged to, and/or contained the confidential information of, the Cayman Companies (the "Cayman Documents").

17. The Cayman Documents were not in the public domain and the information about the Cayman Companies was plainly held in the Cayman Islands by the persons, subject to duties of confidentiality and subject to the requirements of CRPL.

18. The ATO's affidavit indicates that the Cayman Documents were "*provided to the ATO by the Cayman Islands Competent Authority*." While there is no indication in the affidavit as to who the "*Cayman Islands Competent Authority*" is, the Applicants understand that it is CITIA and the Cayman Documents were provided pursuant to a request under the TIA Law and Schedule 16 ("the Request").

19. Although the Cayman Companies are not parties to the Australian Tax Proceedings, they are plainly persons who were the subject of a request by the Australian Tax Authority under the TIA and Schedule 16 and plainly persons affected by the execution of a request by CITIA.

20. By letter dated the 13th July 2012, the Cayman Companies' attorneys, Solomon Harris, notified CITIA that the Cayman Companies understood that the Request had been made to CITIA by the Australian Tax Authority and that it was the Cayman Companies' view that the Request was not in accordance with Schedule 16 on the basis that:

i. The Australian Tax Proceedings related to the assessment of tax for periods prior to 2007, whereas article 12(b) Schedule 16 only permits the provision of information in relation to taxable periods which arise after the 1st July 2010;

ii. The Australian Tax Authority had failed to pursue all means available in its own territory to obtain information that it sought; and

iii. As a matter of Australian law, the Australian Tax Authority was not entitled to make a request under Schedule 16 for the purposes of obtaining evidence for use in the Australian Tax Proceedings.

21. The 13th July 2012 letter to CITIA requested that CITIA provide a copy of the Request, and give details of the basis upon which CITIA made its determination that the Request was in compliance with Schedule 16 and the TIA Law.

22. By letter dated the 10th August 2012 CITIA refused to provide a copy of the Request to the Cayman Companies on the grounds that the Request was confidential pursuant to Article 8 of Schedule 16. CITIA also stated that it had certified that the Request was in compliance with Article 5 of Schedule 16 but gave no indication of the basis upon which it made that certification.

23. By letter dated the 5th September 2012 the attorneys for the Cayman Companies responded to the CITIA indicating that on a true construction of Article 8 of Schedule 16, the Request was not subject to confidentiality, and also questioning the basis upon which CITIA had certified the Request as being compliant in circumstances where the information which was sought was clearly in relation to tax periods prior to the 1st July 2010.

24. By letter dated the 13th September 2012 CITIA responded disputing the Cayman Companies' interpretation of Article 8 of Schedule 16. CITIA also reasserted that it had certified that the Request was in compliance with Schedule 16, but again provided none of the information upon which that certification as based.

GROUNDS ON WHICH RELIEF IS SOUGHT
AS SET OUT IN O.53 APPLICATION

25. From the limited information available to the Applicants it seems clear that the Request was not made in accordance with the provisions of the TIA or Schedule 16, in that:

i. It sought the provision of information in relation to taxable periods prior to the 1st July 2010 contrary to Article 12.

ii. The Request did not contain a proper description of the tax purpose of the information sought it did not describe the tax year to which it related.

iii. The Applicants were not notified of the Request or application to the Court and denied a fair hearing at which they could have shown that the request did not comply with the TIA or Schedule 16.

26. In the premises the person or persons who produced the information to CITIA acted without lawful authority and in contravention of CRPL when producing the information and CITIA unlawfully procured such contravention.

27. Further, or in the alternative, the production of the information was an unlawful invasion of the Applicants' rights of privacy and/or right of access to the Court.

28. In the circumstances the Applicants are entitled to a declaration that the CITIA acted *ultra vires* of the powers granted to CITIA by the TIA Law, and an order that the Decision to comply with the Request be quashed.

29. The Applicants are also entitled to be provided with all documents held by CITIA relevant to this matter, including but not limited to, the Request.

30. The Applicants specifically reserve the right to add and/or amend the relief sought and/or the grounds for relief upon proper disclosure by CITIA.

CHRONOLOGY OF PROCEEDINGS

31. On the 2nd November 2012 this Court granted the Applicants leave to apply for Judicial Review outside of the three-month period pursuant to GCR O.53 r.4(1).

32. In addition, the Court granted the Applicants leave to seek Judicial Review against the First Respondent for a declaration that the decision of the First Respondent on an unknown date to accede to the Request from the Australian Taxation Authority, made pursuant to a tax information sharing agreement entered into between the governments of Australia and the Cayman Islands, that the First Respondent obtain documents in the Cayman Islands belonging to and/or containing information relating to the Applicants and thereafter deliver the said documents to the

Australian Tax Authority for the purpose of judicial proceedings currently before the Australian Courts.

33. On the 12th December 2012 an Acknowledgment of Service was filed on behalf of the Respondents confirming that the Respondents intended to contest or otherwise participate in these proceedings.

34. On the 4th January 2013 the Attorney General filed a Summons on behalf of the Respondents pursuant to GCR O.3 r.5(1) and GCR O.53 r.6(4) for an extension of time to file the affidavit on behalf of the First Respondent.

35. On the 10th January 2013 Mr. Duncan Nicol ("Mr. Nicol") the director of the First Respondent swore and filed an affidavit in these proceedings.

36. The hearing on the 24th January 2013 was effectively for preliminary directions pursuant to GCR O.53 r.5(4) in that the First Respondent is seeking leave pursuant to GCR O.3 r.5(1) and GCR O.53 r.6(4) for an extension of time for filing the affidavits on behalf of the First Respondent. In addition, the Applicants seek discovery of all documentation referred to in Mr. Nicol's affidavit and pursuant to their Notice dated the 16th January 20013 pursuant to GCR O.24 r.(10).

37. This Court granted leave to the Applicants to seek Judicial Review against the First Respondent for:

a. A declaration that the decision of the First Respondent was *ultra vires* of the powers granted to the First Respondent by the TIA Law (2009 Revision);

b. An Order for *Certiorari* that the said decision be quashed;

c. An Order that the First Respondent do provide the Applicants with copies of all documents held by it in any way related to the request including but not limited to all correspondence between the First Respondent and the Australian Tax Authority.

38. This is the first hearing for preliminary directions pursuant to GCR O.53. It has been agreed between the parties that there is no objection to the Applicants seeking leave to amend their Amended Petition, nor leave to file the Second Affidavit of John Hyde Page.

39. On the 24th January 2013 it was agreed between the parties that the original Third Applicant, Bywater Investments Limited, as well as the original Second Respondent, namely the Attorney General, are no longer parties to these proceedings.

40. The application for leave for Judicial Review was grounded by the affidavit of Mr. Thomas Harington John Hyde Page ("Mr. Page") dated the 18th September 2012 and the affidavit of Ms. Juliet Rosemary Lucy ("Ms. Lucy") dated the 25th October 2012.

41. The remaining issue before this Court on this preliminary directions hearing is whether I should order discovery of the Request from the Australian Taxation Authority, dated the 23rd February 2011, to the Respondent.

MR. NICOL'S AFFIDAVIT

42. In his affidavit Mr. Nicol confirmed that on the 28th March 2011 he received a Request for information from the Australian Taxation Authority pursuant to the agreement between the Government of the Cayman Islands and the Government of Australia on the exchange of information with respect to taxes only in respect of taxable periods on or after the 1st July 2010.

43. Mr. Nicol confirmed that the Request conformed with Article 5(5) of the Australian Tax Agreement and that it contained:

a. The identity of the person or persons under examination;

b. A statement of the information sought including the nature of the information and the form in which the requesting party wished to receive the information from the competent authority;

c. The tax purpose for which the information was sought;

d. The grounds for believing that the requested information was held in the Cayman Islands or was in the possession or control of a person within the Cayman Islands;

e. To the extent known by the requesting party, the name and address of the person believed to be in possession of the requested information;

f. A statement that the request was in conformity with the law and the administrative practices of the requesting party;

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g. That if the requested information was within the jurisdiction of the requesting party then the competent authority of the requesting party would be able to obtain the information under the laws of the requesting party or in the normal course of administrative practice, in that the request was in conformity with the agreement;

h. A statement that the requesting party had pursued all means available in Australia to obtain the information, except those that would give rise to disproportionate difficulties.

44. Mr. Nicol averred in his affidavit that he determined that the Request contained all of the information required to demonstrate the "foreseeable relevance" of the information sought in accordance with Article 5(5) of the Australian Tax Agreement and that, accordingly, it complied with the terms of the Australian Tax Agreement.

45. Consequently Mr. Nicol confirmed that the Respondent issued a certificate of compliance, indicating that the request was in compliance with the Agreement.

46. At paragraph 9 of Mr. Nicols' Affidavit, he states that the Request made in accordance with Article 5 of the Australian Tax Agreement was in connection with an "active investigation" into the Australian taxation affairs of X and Y who are located in Australia and that the Cayman Islands information request in respect of X and Y was required to assist the Australian taxation office to determine the Australian income tax payable by X and Y and/or associated entities for the taxable period commencing on the 1st July 2010.

47. Mr. Nicol went on to aver at paragraph 10 that the Respondent therefore determined that the request fell under s.8(4)(b) of the TIA Law. In making this decision Mr. Nicol had considered it unnecessary to apply to Judge for an Order to produce such documents pursuant to s.8(4)(a) of the TIA Law because the request did not relate to proceedings in the territory of the requesting party or related investigations.

48. Consequently, on the 14th April 2011 the Respondent, in accordance with s.8(4)(b) of the Law, served a Notice to Produce Information on FCM Limited of Grand Pavilion, West Bay Road, Grand Cayman, as the entity believed to be in possession of the information sought in the request.

49. FCM Ltd. ("FCM") is a licenced service provider for the first two Applicants in these proceedings.

50. Some time after the 14th April 2011 FCM provided the information transmitted by the Respondent to the requesting party on the 5th May 2011.

51. Mr. Nicol avers at page 15 that he read the affidavit of Mr. Page dated the 18th September 2011 and notes that Mr. Page was a barrister admitted to practice law in New South Wales, which is a state of the Commonwealth of Australia and that Mr. Page avers to the following facts:

i. That certain taxpayer entities are currently engaged in litigation in Australia in which they are appealing income tax liabilities assessed for years falling within the period 2000 and 2007;

ii. That there are no tax liabilities in dispute for time periods subsequent to 30th June 2007;

iii. That there are separate recovery proceedings in the Australian Courts;

iv. That the appeal proceedings commenced by the aforementioned taxpayer entities in May 2011;

v. That the recovery proceedings were commenced by the requesting party in August 2010.

52. Mr. Nicol confirmed that he acted upon the representations made in the Request by the Requesting Party – that is, that the Request was in connection with an "active investigation" into the Australian taxation affairs of X and Y and in respect of the taxable period commencing the 1st July 2010.

53. Mr. Nicol also stated that the Respondent has no direct knowledge of the litigation in Australia in respect of income tax liabilities assessed for years falling within the period 2000-2007, or in the recovery proceedings or in the appeal proceedings referred to in Mr. Page's affidavit.

54. Mr. Nicol averred in his affidavit that the Applicants were not named as the subjects of the Request and were therefore not entitled to be notified of the Request.

55. Mr. Nicol confirmed that the Respondent has refused requests to provide discovery from the Applicants' attorneys, based on the Respondent's confidentiality obligations.

APPLICANTS' POSITION

56. The Applicants rely on the First Affidavit of Mr. Page and the Affidavit of Ms. Lucy, sworn on the 25th October 2012. The Applicants maintain that the information has been used in underlying Australian proceedings. The Applicants contend that, but for the TIA Law, the information which was shared with the Australian Tax Authority could not be given without the contravention of the CRPL and further, that the provision of information is an infringement of the Applicant's rights of privacy under the Constitution.

57. The Applicants maintain that, contrary to s.3(2) and Schedule 16, Article 12 of the TIA Law, the affidavits of Mr. Page and Ms. Lucy disclose that the Request appears to have sought the provision of information in relation to taxable periods prior to the 1st July 2010.

58. Further, the Applicants submit that contrary to Schedule 16, Article 5(c), the Request did not contain a proper description of the tax purpose for which the information was sought as:

i. It did not properly describe the tax years to which it related;

ii. It did not disclose that the Requesting Party required the information for the purposes of proceedings which were before the Australian Courts.

59. The Applicants maintain that, contrary to Schedule 16, Article 5(f) and (g) of the TIA Law, the Requesting Party was not entitled as a matter of Australian law, to utilize the request procedure for the purposes of obtaining evidence for the proceedings before the Australian Courts.

60. The Applicants contend that the information was provided to the Requesting Party in breach of rights of privacy and in contravention of the CRPL. The Applicants contend that the consequences are that the Respondent's grant of the request was ultra vires.

61. The Applicants' position is that the information sought:

i. Was in relation to Court proceedings;

ii. Was in relation to the investigation of tax years which pre-dated the 1st July 2010;

iii. As a matter of Australian law, the Requesting Party was not entitled to use procedures set out in Schedule 16 of the TIA Law to obtain evidence to support its Australian proceedings.

62. Leading counsel Mr. Lowe Q.C. on behalf of the Applicants submits that the Respondent has a duty to enquire into the Request. Mr. Lowe contends that an administrative body such as the Respondent, in exercising powers of this nature, has a positive duty to acquaint itself with all relevant material before it makes any decision. Mr. Lowe relies upon the dicta of Lord Diplock in the House of Lords decision of the ***Secretary of State for Education and Science v. Tameside Metropolitan B.C***. [1977] A.C. 1014 where Lord Diplock stated at page 1065:

> "*the question for the Court is, did the [decision maker] ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?*"

63. Leading counsel on behalf of Applicants states that, from Mr. Nicol's affidavit it is not at all clear what was contained in the various Requests made to the Respondent and therefore it is not clear what information was given to the Respondent, nor what information the Respondent relied upon before acceding to the Request.

64. Finally, the Applicants submit that they and the Court are entitled to see the Request referred to in Mr Nicol affidavit.

65. The Applicants have issued a Notice, dated the 16th January 2013, pursuant to GCR O.24 r.10 requiring copies of the request and all documentation referred to in Mr. Nicol's affidavit. The Respondent replied and declined to disclose the documents on the basis of confidentiality.

66. On behalf of the Applicants Mr. Lowe contends that the Respondent failed to make any enquiry and that the Respondent simply reviewed the request and complied with it without even attempting to discharge his ***Tameside*** Duty.

67. Furthermore, the Applicants, who are the subject of the Request for the information, complain that they were not served with Notices under s.17(1) of the TIA Law, which, provided that their addresses were known, is a mandatory requirement in order that the Applicants know of the Request and have the opportunity, under s.17(1), to make written submissions.

68. The Applicants contend that it has become apparent that information belonging to the Applicants has been used in the Australian proceedings and, accordingly, the Respondent should have served the Applicants with Notices under s.17(1) of the TIA Law. The information is the Applicants' information, it is not confidential

between the Applicants and the CITIA. If there is any sensitive third party such as the identity of a whistleblower, then that identity can be redacted.

69. Furthermore, leading counsel on behalf of the Applicant says that any information within the Request is subject to the implied undertaking.

70. Mr. Lowe submits that there is nothing in Article 8 to prevent the discovery of the Request in these proceedings. The Applicants contend that the Respondent's objection to discovery of the Request on the ground of confidentiality pursuant to Schedule 16, Article 8 of the TIA Law, does not withstand scrutiny. Mr. Lowe submits that on a true construction Schedule 16, Article 8 only prevents disclosure, beyond certain permitted entities, of information received from the Requested Authority (in this case CITIA) without first getting the Requested Authority's' written permission.

71. Consequently, Mr. Lowe submits that any suggestion that this confidentiality also applies to requests made to a Requested Authority would necessarily lead to the illogical requirement, pursuant to the final sentence of Article 8,that the Respondent would need to seek its own permission to release the Request to any person not specifically permitted within Article 8.

72. Furthermore, if the Respondents object to disclosure on the grounds of confidentiality pursuant to Article 8, it would follow that the Respondent would be prevented from making any disclosure to this Court. Mr. Lowe submits that this cannot be correct. Furthermore, Mr. Lowe submits that the ***Tameside*** Duty clearly dictates that all information upon which an administrative body bases its decision is open to review by the Court.

73. Mr. Lowe contends that there is an invasion of the Applicants' privacy under the new Constitution. Mr. Lowe contends that CITIA must not go further than is necessary and proportionate within the parameters of the legislation and, to construe Schedule 16 Article 8 narrowly, or as narrowly as the Respondent wishes, would hamper the Court's ability to conduct a proper Judicial Review hearing. One of the functions of the Court is to police alleged invasions of privacy.

74. Mr. Lowe states that it is clear that the Mr. Nicol was not told of the Australian proceedings and, to that extent, Mr. Lowe contends that the Court must see the document and, after seeing the document, Mr. Lowe contends that the Request must be disclosed to the Applicants – with whatever redaction is necessary to conceal the identities of such persons as whistleblowers.

RESPONDENT'S POSITION

75. The Attorney submitted that there was no objection to the Court viewing the document as a matter of public interest. However, the Attorney General submits that the Respondent owes the duty of confidentiality pursuant to Article 8 of the TIA Law and therefore the Court should not order discovery of the Request to the Applicants.

76. The Attorney submits that the targets of the Request are not MH Investments or J.A. Investments, the targets are Mr. X and Mr. Y. However, the Attorney accepts that the Applicants may be the holders of information which is "foreseeably relevant" to assist in the assessment of the tax affairs of Mr. X and Mr. Y.

77. The Attorney confirms that the Respondent received a straightforward Request, and he had no reason to believe that the Request related to any proceedings. The

Request only made reference to an active investigation. The Attorney General describes the Request as a "a plain vanilla request" which did not come under s.8(4)(a) but under s.8(4)(b) of the TIA Law. The Request was for information from the registered agent and service provider – FCM – which is the custodian of the information requested by the Requesting Party. The Attorney General maintains that the Applicants were not the subject of the Request.

78. It is the Respondent's position that the Request did not relate to any taxable period before the 1st July 2010. The targets of the investigation – Mr. X and Mr. Y – have means available in Australia to obtain information. Article 5(5)(c) sets out the tax person for which the information is being sought for the active investigation.

79. The Attorney General relies on the Bermuda Court of Appeal decision ***Coxon et al v. The Minister of Finance & Ors*** Civ Appeal No. 5 of 2007 and the Judgment of Nazareth JA. The Attorney General cites Nazareth JA at page 3 where he states:

> "*The Minister's power to issue a notice stems from the Act. So long as the Minster has complied with the requirements of the Act, the issuance of a notice will be valid.*"

Nazareth JA on behalf of the Bermuda Court of Appeal further states:

> "*The notices are not liable to be set aside on the basis of allegations that certain facts stated in the request were untrue. The Minister is entitled to rely on the certification by the appropriate US authority as the facts required to be stated in a request and the relevance to the investigation. The Minister does not have a separate statutory obligation to investigate the facts stated in a request, to determine either their accuracy or their relevance.*"

The Court of Appeal goes on to state at page 5:

"They accept the submissions and that the intention of the legislation is that the Minister should rely on the certification of the relevant US Authority on this matter. The relevant sections of the Act require that the request contain certain information and be certified by an appropriate person in the US government. Had the legislators sought to impose on the Minister a duty to investigate the facts alleged in the request, he would have especially required that the Minister be satisfied of the correctness of the information."

80. The Bermuda Court of Appeal in ***Coxon et al v. The Minister of Finance & Ors*** adopted the approach of Ground J. (as he then was) in ***Bermuda Trust Company Limited et al v. The Minister of Finance*** [1996] Bda LR 45 in which Ground J. relied upon the judgment of Georges JA in ***Bertoli & Ors v. Malone*** (1990-91) CILR 58 and (1992) LRC (Cons) 960 which was adopted in toto by the Privy Council on further appeal [see Ibid at 979] at p. 970:

"In deciding whether there was reasonable grounds for believing that an offence has been committed and that the information sought relates to the offence, the authority must assume the correctness of the information laid before it in the request. Clearly, he cannot receive evidence to raise doubts as to this."

81. Nazareth JA goes on to state:

"The equivalent of the Cayman (Authority) in Bermuda under the Convention would be the Minister. If the Minister is precluded from considering the correctness of the information laid before him, then a fortiori the court, in reviewing his decision, must also be restricted from doing so."

82. The Attorney submits that following ***Coxon*** and ***Bertoli*** the Respondent had no reason to seek clarification and further there was no ***Tameside*** Duty to make an enquiry. The Attorney contends that the Respondent in this case now before the Court quite correctly assumed the correctness of the Request.

83. The Attorney also submitted that he would not go so far as to describe the Applicants as busybodies, but they had no basis or good reason for wanting to see the request; they are not Mr. X and Mr. Y. The Attorney submits that the Respondent has not behaved illegally and there is no incorrectness.

84. Furthermore the Attorney General argues that discovery in Judicial Review proceedings is not automatic as in other civil proceedings. The Attorney General submits that the Court should only order discovery to dispose of matters fairly if it can be shown that the evidence of the Respondent is in accurate or inconsistent or otherwise incomplete.

85. The Attorney General submits that there is no basis for questioning the accuracy of the evidence – which is a pre-requisite for granting discovery. Moreover, the Attorney General submits that it is not sufficient for the Applicants simply to make allegations and assertions and to invite the Court to conclude that the denial by the Respondent is insufficient.'

86. The Attorney submits that the Court should not order discovery where there is no material before it to show that the Respondent's decision making process was defective, unreasonable or open to challenge. The Attorney General submits that this application is more akin to a fishing expedition, and states that the purpose of the application for discovery is to enable the Applicants to study the Respondent's documents to see if some flaw in the decision making process can be established. He repeats that the basis of their application for discovery is to look for a flaw, rather than dispose of the matter fairly.

87. The Attorney General submits that the application for leave and for discovery misconstrues the actions of the Requesting Party. The Attorney General acknowledges that the Respondent has a duty of candour, but, at the time the Request was made to the Respondent, the Respondent was not aware, and had no reason to be aware, that the documents were required for legal proceedings. The Respondent was guided at all times by what appeared on the face of the Request which was in relation to active investigations.

88. The Attorney General reiterated that the Respondent's position is that the Applicants are not the subject of the Request and they have no basis to see the request.

DISCOVERY IN JUDICIAL REVIEW PROCEEDINGS

89. The sole issue before me at this preliminary and first hearing for directions is whether I should order discovery of the Request dated the 23rd February 2011 and received from the Australian Taxation Authority by the Respondent on the 28th March 2011.

90. It must follow that my decision, whether to order discovery of the Request or not, will also apply to the Supplementary Request received from the Australian Taxation Authority by the Respondent on the 12th July 2011, and, the related documents referred to in Mr. Nicol's affidavit.

91. GCR O.53 r.8 reads:

"*Interlocutory Applications (O.53, r.8)*

8. (1) Unless the Court otherwise directs, any interlocutory applications shall be made at the first hearing of the Notice of Motion.

(2) In this rule "interlocutory applications" includes an application under O.24, O.26, O.38 r.2(3), or, for an order granting relief or dismissing the application by consent of the parties."

92. GCR O.24 r.3 reads:

"Order for discovery (O.24, r.3)

3. (1) Subject to the provisions of this rule and of rules 4 and 8, the Court may order any party to a cause or matter, (whether begun by writ, originating summons or otherwise) to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter...."

93. The learned editors of the ***Supreme Court Practice 1999*** at O.24 r.3(4) state:

"O.24, r.3 (unlike O.24, rr.1 and 2) is wide enough in scope to apply to proceedings for judicial review. Therefore, although discovery is not automatic in judicial review proceedings, the court may order discovery where such an order is necessary for disposing of the matter fairly within the meaning of O.24, r.8 ***(R v. Inland Revenue Commrs, ex. p. J. Rothschild Holdings p.l.c.*** *[1986] S.T.C. 410; (aff). [1987] S.T.C.163 CA)."*

94. The learned editors go on to state:

"*Because of the nature of an application for judicial review, discovery in judicial review proceedings is inevitably different from discovery in an action begun by writ; although the court has power under O.24, r.3 to order discovery in judicial proceedings, it will be appropriate in fewer cases and is likely to be more circumscribed* ***(R v. Secretary of State for the Home Office, ex p. Harrison*** *[1988] 3 All E. R. 86, CA).*"

95. Although the Attorney General did not specifically cite ***R v. Commrs of Inland Revenue, ex. p. Taylor*** [1989] 1 All E.R. 906 he does submit that the Court should refuse the Applicants' application for discovery of the request on the basis of the Judgment of Farquharson J. to support his contention that there is no

> *"...material before [the Court] which can be relied upon and which tends to show that [CITIA's] process of reasoning was defective or unreasonable or open to challenge."*

Further, the Attorney General submitted, using Farquharson J's words that "*if the purpose of the application is to study that [request] to see if there is any flaw in the manner of [Mr. Nicols'] decision making process, it seems to me that it goes to the other side of the line and it is not a case where the Court can properly order disclosure.*"

96. The learned editors of the ***Supreme Court Practice*** refer to this case but before so doing state the following at the top of page 452 of O.24 r.3(4):

> "*As a general principle in judicial review discovery will be ordered where it is required in order that the justice of the case may be advanced and where it is, within the meaning of O.24, r.8, necessary for disposing fairly of the matter;...*"

97. The learned editors of the ***Supreme Court Practice*** also state at O. 24/3/4/ on page 452:

> "*In an application for judicial review the burden of proof lies on the applicant to raise his case .....and the court will refuse to order discovery against the Respondent in order to make good, defects in the evidence adduced by the Applicant. See* ***R v. Secretary of State for the Home Dept. ex p. Singh*** *[1988] the Independent April 11 CA*"

98. For further helpful guidance on the principles to be applied on discovery in judicial review, the editors of the ***Supreme Court Practice 1999*** refer, at O.24 r.3/4 to the case of ***R v. Secretary of State for Home Department ex p Benson*** [1989] C.O.D. 249 and the Queen's Bench Division of Lloyd LJ and Nolan J (as they then were). The Home Secretary, when refusing to accept the Parole Board's recommendations for release of a prisoner, cannot, on the ground of privilege, withhold medical reports from an applicant seeking judicial review of his decision: But the Applicant has to show that the reports are central to the application as well as relevant.

99. By granting the Applicants leave for judicial review of the Respondent's decision, I have already ruled that the Applicants have a sufficient interest in the matter to which the application relates and further, that the Applicants have an arguable case for review. The Court will obviously hear substantive arguments on the whole question of judicial review at the substantive hearing. In Michael Fordham's textbook – ***Judicial Review Handbook, Third Edition (2001)***, which was written after the new Civil Procedure Rules ("CPR") were enacted in the United Kingdom – he states at paragraph 19.4.6:

> *"The general test of discovery (now disclosure) under the pre-CPR rules was whether it was "necessary either for disposing fairly of the cause or matter or for saving costs."....This rule was incorporated by reference into judicial review proceedings by RSC O.53, r.8(1) [which is the same as our GCR O.53 r.8(1).*"

For this general test of discovery Mr. Fordham refers to the case of ***R v. Secretary of State for Health, ex p. London Borough of Hackney*** 29th July 1994 unrep., where the then Master of the Rolls, Sir Thomas Bingham stated:

> *"I think it is broadly true to say that [disclosure] will be regarded as necessary for disposing fairly of the action, or application, if a party raises a factual issue of sufficient substance to lead the court to conclude that it may, or will, be unable to resolve the issue fairly, fairly that is to all parties, without [disclosure] of documents bearing on the issue one way or the other."*

100. ***De Smith's Judicial Review, Sixth Edition*, (*2007*),** which was also published after the introduction of the new CPR, states at paragraph 7-057, referring to the House of Lords decision in ***Re D (Minors) (Adoption Reports): (Confidentiality)*** (1996) A.C. 593 and the English Court of Appeal case of ***R v. Secretary of State for the Home Dept. ex p. Fayed*** [1998] 1 W.L.R. 763 on the issue of the level of disclosure required:

> *"At least in some circumstances there will be a duty on the decision maker to disclose information favourable to the Applicant, as well as information prejudicial to his case...."*

The learned editors of ***De Smith*** go on add at paragraph 7-058:

> *"If relevant evidential material is not disclosed at all to a party who is potentially prejudiced by this, there is prima facie unfairness, irrespective of whether the material in question arose before, during or after the hearing."*

101. ***De Smith*** examines "disclosure" as it is under the new CPR in the United Kingdom, but still "discovery" under the GCR at paragraph 16-066 and states:

> *"Opinion has been divided as to whether discovery should become more routinely available in judicial review proceedings or whether a strict (or stricter) approach should be maintained. A new, "more flexible and less prescriptive principle, which judges the need for disclosure in accordance with the requirements of the particular case, taking into account the facts and circumstances", and having regard to the overriding objective of the CPR, was signalled by the House of Lords in December 2006."*

De Smith was making reference to the House of Lords case relied upon by the Attorney General in his opposition to the Applicants' application for discovery of the Request, namely, ***Tweed v. Parades Commission for Northern Ireland*** [2007] A.C. 650.

102. This Court has received considerable guidance from the Judgments of Lord Bingham of Cornhill and the leading Judgment of Lord Carswell. Lord Bingham of Cornhill states at paragraph 2 on page 655:

> "*The disclosure of documents in civil litigation has been recognised throughout the common law world as a valuable means of eliciting the truth and thus of enabling courts to base their decisions on a sure foundation of fact.*"

And further at paragraph 4 Lord Bingham states:

> "*Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence..... It is enough that the document itself is the best evidence of what it says. There may, however, be reasons (arising, for example, from confidentiality, or the volume of the material in question) why the document should or need not be exhibited. The judge to whom the application for disclosure [or discovery in our case] is made must then rule on whether, and to what extent, disclosure should be made.*"

103. Lord Carswell, referring to the Courts of England and Wales and Northern Ireland, states at paragraph 29:

> "*The courts in both jurisdictions developed over a series of decisions an approach to disclosure in judicial review which is more narrowly confined than in actions commenced by writ. The basis of this approach is that disclosure should be limited to documents relevant to the issues emerging from the affidavits.*"

Lord Carswell referred to other authorities and, in particular, to an article by Oliver Sanders – ***Disclosure of Documents and Claims for Judicial Review*** [2006] JR 194 and stated at E in paragraph 29:

> *"In building upon this foundation the courts developed a restrictive rule whereby they held that unless there is some prima facie case for suggesting that the evidence relied upon by the deciding authority is in some respects incorrect or inadequate it is improper to allow disclosure of documents, the only purpose of which is to act as a challenge to the accuracy of the affidavit evidence."*

104. Lord Carswell then refers to the Law Commission's report on Administrative Law – ***Judicial Review and Statutory Appeals 1994 (Law Comm. No. 226 HC 669***) and the fact that:

> *"The Law Commission expressed the opinion in paragraph 7.12 that the requirements of the accepted rule were unduly restrictive and undermined the basic test of relevance and necessity laid down in* ***O'Reilly v. Mackman*** *[1983] AC 237."*

105. At paragraph 32 Lord Carswell states:

> *"I do consider, however, that it would now be desirable to substitute for the rules hitherto applied, a more flexible and less prescriptive principle, which judges the need for disclosure in accordance with the requirement of the particular case, taking into account the facts and circumstances."*

106. Lord Carswell refers to RSC (NI) O.24 r.11, which is identical to our GCR O.24 r.10 and states at paragraph 33 on page 665 and says:

> *"I am satisfied that the affidavit sworn by Sir Anthony Holland on behalf of the Commission comes within [RSC (NI) O.24] rule11(1)....A party whose affidavits contain a reference to documents should therefore exhibit them in the absence of a sufficient reason, which may include the length or volume of the documents, confidentiality or public interest immunity."*

107. Lord Carswell refers to the duty of candour on any public authority and states at paragraph 39:

> *"I consider that there is force in this view (to see the full document) and that in order to assess the difficult issues of proportionality in this case the court should have access as far as possible to the original documents from which the commission received information and advice."*

108. Finally at paragraph 41 in ***Tweed*** Lord Carswell, in ordering disclosure of the documents sought by the Applicants states:

> *"I think that the judge considering disclosure should first receive and inspect the full text of all the documents in items 2 to 6, so that he may decide whether that would give sufficient extra assistance to the Appellant's case on proportionality, over and above the summary already furnished, to justify its disclosure in the interest of fair disposal of the case. If he does so decide then the question of redaction may have to be considered, in which the parties may be invited to make submissions to the Court. If it decides the contrary in the case of any of the documents that document will not be disclosed to the appellant. Only after this has been settled should the question of public interest immunity receive any necessary consideration."*

CONCLUSION

109. For the purposes of this application for discovery, I find that the information sought by the Australian Tax Authority and forwarded by the Respondent is information belonging to the Applicants. It is not information belonging to FCM – the service provider and custodian. From the limited evidence before me, this information is the Applicants' information and has been used in Australia for tax purposes pursuant to the TIA Law and the Australian Tax Agreement.

110. I also find that the Applicants are the subjects of the Request. Although they are not Mr. X or Mr. Y, it is clear that the Requesting Party requires documents which are the Applicants' documents. Shortly after the preliminary and first directions hearing the Attorney General furnished the Court with a copy of the Request dated the 23rd

February 2011. The Request discloses that the Australian Tax Authority believes Mr. X and Mr. Y to be the ultimate beneficial owners and controllers of the Applicants' companies. Consequently, I find that that the Applicants have locus for this directions hearing and for their application for discovery of the Request.

111. In the Bermuda Court of Appeal case of ***Coxon*** and the Cayman Islands Court of Appeal case of ***Bertoli*** (approved by the Privy Council), and cited by the Attorney, the target of the request had no legal right to seek documentation or information from the Authority – being the Minister of Finance in Bermuda, and the Mutual Legal Assistance Authority in Cayman. Furthermore, neither the Minister of Finance in Bermuda nor the Mutual Legal Assistance Authority in Cayman, had any right to question the certification of the relevant United States Authority. In addition there were no provisions in either the USA-Bermuda Tax Convention Act 1986 or the Cayman Islands Mutual Legal Assistance (USA) Law 1986, to give the targets any right to make written submissions, let alone, to apply for discovery.

112. Section 17(1) of the TIA Law reads:

> "*Subject to subsection (2), a person who is the subject of a request for information solely in relation to a matter which not a criminal matter or an alleged criminal matter, shall, if his whereabouts or address is made known to the Authority, be served with a notice by the Authority advising of the existence of a request specifying that person, the jurisdiction making the request and the general nature of the information sought; and any person so notified may, within fifteen days from the date of receipt of the notice, make a written submission to the Authority specifying any grounds which he wishes the Authority to consider in making its determination as to whether or not the request is in compliance with the provision of the relevant scheduled Agreement or Part IV as the case may be, including any assertions that the information requested is subject to legal privilege.*"

113. Section 17(1) of the TIA Law clearly requires that a person who is the subject of a Request (other than a criminal matter) shall be given notice of the Request and a full opportunity to provide written submissions. This, or any similar provision giving the subject notice of the Request, is absent in the USA-Bermuda Tax Convention Act 1986 and in the Mutual Legal Assistance (USA) Law 1986 of the Cayman Islands.

114. The Applicants submit that the information requested by the Requesting Party is for taxable periods before the 1st July 2010 and is therefore outside of the Australian Tax Agreement between the Respondent and the Australian Tax Authority.

115. In ***Coxon*** and ***Bertoli*** the requested Authority was under no obligation to consider whether the subject of the Request should be heard. In this case, under s.17(1), not only does the subject of the Request have to be notified of the Request, but he is also provided with fifteen days in which to make written submissions to the Respondent, specifying any grounds which he wishes the Respondent to consider in making his determination as to whether or not the Request is in compliance with the provisions of the relevant scheduled Agreement or part iv, as the case may be – including any assertions that the information requested is subject to legal privilege.

116. Furthermore, in the Bermuda Court of Appeal case of ***Coxon***, Lord Diplock's dicta in ***Secretary of State for Education and Science v. Tameside Metropolitan B.C.*** [1977] A.C. 1014 was not even cited and no such ***Tameside*** duty arises in a Request under the USA-Bermuda Tax Convention Act. However, under the TIA Law, the Respondent does have a discretion to either accept the Request and act upon it, pursuant to s.8(4)(b) of the TIA Law, or if the information is required for

proceedings in the territory of the Requesting Party or for related investigations, he shall apply to a Judge for an Order to produce such information.

117. In this case, there is evidence before the Court, adduced by the Applicants, that there are proceedings taking place in Australia, and that information forwarded by the Respondent to the Australian Tax Authority appears in the Australian Tax Proceedings. Furthermore, the Applicants contend that the Australian Tax Authority is using the information for the tax liabilities of Mr. X and Mr. Y before the 1st July 2010. The parties in this case may wish to file further evidence and this Court will need to hear submissions and arguments on whether or not the Australian Tax Authority failed to disclose that the information sought from the Applicants was for the purpose of proceedings in Australia, and further, whether or not the information related to taxable periods prior to the 1st July 2010. I expect that these issues will be the subject of further submissions by the parties at the hearing of the substantive application for judicial review.

118. The Respondent argues that it cannot provide the Request because the duty of confidentiality pursuant to Schedule 16 Article 8 of the TIA Law. Article 8 is entitled "Confidentiality" and reads:

> "*Any information received by a contracting party under this Agreement shall be treated as confidential and may be disclosed only to persons or authorities (including courts and administrative bodies) in the jurisdiction of the Contracting Party concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes governed by this Agreement. Such persons or authorities shall use such information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. The information may not be disclosed to any other person or entity or authority or any other jurisdiction without the express written consent of the competent authority of the Requested Party.*"

119. It is clear that information received by either the Respondent or the Requesting Party may be disclosed to Authorities which include Courts, and further, the information received may be disclosed in public Court proceedings or in judicial decisions.

120. In addition s.8(4)(a) of the TIA Law clearly confirms that information may be submitted to a Judge of the Grand Court for him to decide whether the conditions set out in s.8(7) and (9) are satisfied.

121. Any information contained in the Request will be for these proceedings alone and the parties will be subject to the implied undertaking. Should the Respondent need any further controls regarding its confidentiality, this Court can always make further orders to protect the confidentiality which concerns the Respondent.

122. Discovery is not automatic in judicial review proceedings. However, I find that I should order discovery where such an Order is necessary for disposing of the matter fairly, within the meaning of GCR O.24 r.4. To put it another way, I adopt the principles set out in paragraph 96 *supra*: that discovery is required for the justice of the case to be advanced and, within the meaning of O.24 r.8, necessary for disposing fairly of the matter.

123. There is evidence before me that there are proceedings taking place in Australia, and that information belonging to the Applicants is before the Courts in Australia. Furthermore, the Applicants have contended that this information relates to taxable periods before the 1st July 2010.

124. As Lord Bingham stated in the case of ***R v. Secretary of State for Health, ex p. London Borough of Hackney*** (paragraph 99 *supra*):

> "*Discovery will be regarded as necessary for disposing fairly of the action, or application, if a party raises a factual issue of sufficient substance (my emphasis) to lead the court to conclude that it may or will be unable to resolve the issue fairly, fairly that is to all parties, without discovery of documents bearing on the issue one way or the other.*"

125. Adopting Lord Bingham's words I find that the Applicants have raised factual issues of sufficient substance to lead me to conclude that this Court cannot resolve the issues before it fairly, that is, fairly to all parties without discovery to the Applicants of the Request and the other documents referred to in Mr. Nicol's affidavit. Indeed, I would go so far as to say that if this material is not disclosed, the Applicants are potentially prejudiced, and there would be prima facie unfairness.

126. It is my opinion that the Request and the Supplementary Request are, to use Lloyd LJ's words, in ***R v. Secretary of State for Home Department ex p Benson*** "relevant and central" to the Applicants' application for judicial review. I find that the Applicants are entitled to see the Request, which relates to them, and further, relates to their information and documentation which, if it were not for the TIA Law, would be subject to the Cayman Islands CRPL. Furthermore, this Court would not be in a position to adjudicate on these judicial review proceedings without both parties reviewing the Request and making their submissions on it.

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127. Although our GCR are different from the new English CPR, the principles derived from the House of Lords decision in ***Tweed v. Parades Commission for Northern Ireland*** are applicable to these proceedings.

128. The House of Lords has relaxed the rules relating to discovery on judicial review. Following on from ***Tweed***, the rules to be applied are much less restrictive and allow the Court to consider the need for discovery in accordance with the requirements of the particular case – taking into account all the facts and circumstances.

129. Mr. Nicol has referred to the Request and it would appear that although the Respondent objects to discovery on the grounds of confidentiality, the Requests are material and relevant documents that should be exhibited and put before the Court. The Request is, as Lord Bingham said, the best evidence of what it says.

130. Having inspected the Request, it is my view that it will give the parties and the Court the best evidence of what it says and a fuller picture of the facts over and above the summary already supplied by the Respondent. I find that the Request, the Supplementary Request and the related documents referred to in Mr. Nicol's affidavit are clearly relevant to the issues emerging from my review of the affidavits filed in these proceedings and therefore its discovery is in the interests of a fair disposal of the case.

131. I have considered the possible prejudice or risk of prejudice to the Respondent by ordering the discovery of the Request. Having considered the evidence before me, and the submissions of the Attorney and leading counsel for the Applicants, I do not find any prejudice or risk of prejudice to the Respondent.

132. To disclose the Request to the Applicants is in keeping with the Respondent's duty of candour, as with any other public authority, and accordingly I order the discovery of the Request, the Supplementary Request and the related documents referred to in Mr. Nicol's affidavit.

133. I will hear counsel for the parties on the question of what, if any information needs to be redacted from the Request and which further directions they require.

Dated this the 28th day of February 2013

Honourable Mr. Justice Charles Quin
Judge of the Grand Court