IN THE CAYMAN ISLANDS COURT OF APPEAL

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

C.I.C.A. NO. 5 OF 1990

BEFORE:	THE HONOURABLE MR. JUSTICE ZACCA,	PRESIDENT
	THE HONOURABLE MR. JUSTICE GEORGES,	J.A.
	THE HONOURABLE MR. JUSTICE KERR,	J.A.
BETWEEN:	RICHARD O. BERTOLI LEO M. EISENBERG RICHARD CANNISTRARO	APPELLANTS/ PLAINTIFFS
A N D	SIR DENIS MALONE	RESPONDENT

MR. ROBIN POTTS, Q.C. and MR. C. QUIN FOR THE APPELLANTS

MR. CHRISTOPHER CLARKE, Q.C. and MR. RICHARD FINLAY
FOR THE RESPONDENT

SEPTEMBER 24, 25, 26, 27 and NOVEMBER 28, 1990

GEORGES, J.A.:

The appellants are the defendants in an indictment now pending before the United States District Court, District of New Jersey. All three are charged with having conducted the affairs of a brokerage firm through a pattern of racketeering activity consisting of acts of mail fraud, wire fraud and interstate transportation of moneys. They are also charged with obstruction of justice. In essence, it is alleged that the appellants, through nominee companies, purchased blocks of shares in certain companies knowing that favourable research reports concerning these companies, prepared by one of them or with their connivance would shortly be published, reports which would cause the price of the shares to rise.

After the shares had risen as had been expected, the appellants sold them at a profit which they pocketed. The reports, it was alleged, had been misleading in that they failed

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to disclose, as the law required that they should, the holdings which the defendants had acquired in the various companies. It was further alleged that the appellants had obstructed justice by concealing and destroying some of the records of the brokerage firm when the investigation into its activities was launched. This indictment followed upon hearings before a Grand Jury at various times in 1985, 1987 and 1988.

In the course of the conduct of these proceedings it became necessary to obtain evidence from persons and entities in the Cayman Islands falling within the ambit of the Confidential Relationships [Preservation] Law 1976 and its amendment of 1979. The appropriate steps were taken and in due course a letter of request reached the Grand Court seeking its assistance in having the required evidence made available. The appellants were served with notice of these proceedings.

The order made by the District Court, New Jersey, requesting orders by the Grand Court under the Evidence [Proceedings in Other Jurisdictions] [Cayman Islands] Order 1978 ["The Order"] contained the following paragraph :

> "The Defendant herein[the present appellants] may not challenge either this Court order or the letter of request in any proceedings before the Grand Court of the Cayman Islands....."

The appellants on December 11, 1989 filed a writ naming as defendants Richard M. Thornberg, the United States Attorney-General, and three named United States Attorneys involved in the application by way of letters of request. The appellants sought declarations that they were entitled and had a legal right to be heard in any proceedings in the Grand Court pursuant to the letters of request and an injunction restraining the defendants from making any application under the order which denied them the right to challenge the application or any proceedings thereon. On January 4, 1990 Schofield, J. granted an interlocutory injunction restraining the defendants in the terms sought. Leave was granted to serve the writ, the interlo-

cutory order and the supporting documents out of the jurisdiction on the United States Attorney-General and the other three named defendants. They took no steps having been served and did not proceed with the application for letters of request which was eventually withdrawn.

Instead of proceeding by that route the United States Authorities had decided to take advantage of the Mutual Legal Assistance Treaty ["The Treaty"] entered into between the United States of America and the United Kingdom acting on behalf of the Cayman Islands. The Treaty had been signed in July 1986 and in November 1986 the Cayman Legislature had passed the Mutual Legal Assistance [United States of America] Law [the law] to give effect to its provisions so soon as the Treaty had been ratified. The Governor had duly assented to the Law but section 1 provided that it should come into operation on a date to be appointed by the Governor by proclamation published in the Gazette. The Treaty had not been approved by the Senate of the United States of America until March 1989. Instruments of ratification were exchanged in mid-March. A notice by the Governor appointed March 30,1990 as the day on which the Law was to come into force. The application for assistance under the Law is dated April 4, 1990. It was sent to the Chief Justice of the Cayman Islands Sir Denis Malone, who in the terms of section 4 of the Law was the Cayman Mutual Legal Assistance Authority [the Authority]. That section provided that the Chief Justice of the Cayman Islands "acting alone and in an administrative capacity" was to be the Authority under the Law. It was supported by an affidavit sworn to by Russel Cahill, a special agent of the Federal Bureau of Investigation.

It would appear that it was necessary for the prosecution in the pending criminal trial in the District Court of New Jersey, to apply by way of Motion for leave to take Foreign Depositions.

This was done. The letter of request under the Treaty with supporting documentation was served on the appellants. A consent order was signed which in part recited that :

> "..... the consent of the defendants to the granting of this Order shall not act as a waiver of any right of these defendants to contest either the right of the United States to have proceeded under the Treaty or the constitutionality of the Treaty; nor shall this consent be construed as consent of the defendants that the United States is entitled to any depositions or documents pursuant to the Treaty Request of April 4, 1990. "

The appellents did not approach the Authority though aware that the request had been made. Mr. Potts explains that there was some apprehension that the attorneys in charge of the prosecution may have sought injunctions restraining the appellants from so doing. It does appear, however, that the consent order specifically preserved the appellant's right to challenge the United States' entitlement to any depositions or documents.

Pursuant to the request for assistance the Authority issued notices on persons who were to produce documents, the production of which had been sought in the request. This came to the knowledge of the appellants and on May 10, 1990 they applied ex parte for orders to join a fifth defendant the Authority appointed by the United States under the Treaty and a sixth defendant, the Cayman Authority in the action already commenced against the United States' Attorney-General and three others. Injunctions were sought restraining all the defendants from proceeding under the request for mutual assistance in any manner which denied or disregarded the appellants' right to challenge the application. As regards the fifth and sixth defendants, injunctions were sought restraining them from taking any further step under the request for assistance of April 4, 1990.

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No injunctions were actually issued. Discussions led to an acceptable undertaking. The writ was amended by removing the names of all defendants save the sixth defendant. The remedy sought in the amended writ was as follows -

> "1. That in any application or request to the Cayman Authority being made by the former defendants or any of them under the Mutual Legal Assistance [United States of America] Law of 1986 by or pursuant to a request from the Central Authority of the United States the Appellants are entitled to have a legal right to be heard and oppose the application ; and
>
> 2. That any steps taken or hereafter taken by the Respondent to execute a Request dated the 4th of April 1990 by the United States Authority are and will be ultra vires of the Authority and void and of no effect."

The action came on for trial before Schofield, J. on June 11, 1990. He enquired of the Attorney General who appeared for the Authority whether the approach of his client was that in relation to requests under the Treaty no hearing would be afforded. The Attorney-General replied that no hearing would be afforded. This position was based on the construction of the Law. The Law did not oblige the Authority to consider whether to extend a hearing to any given person.

In the course of an application in Chambers on June 14, 1990 the Attorney-General repeated that the Authority had decided never to permit a hearing to any person who was the subject of a Treaty request and this was so even if that person had been served by the United States' Authority with copies of the request. The Authority would, however, give due and proper consideration to any material fact which came to its notice, including a written representation. Such consideration did not involve notifying the person making such representations of the ultimate determination of the Authority. The appellants did submit written representationsto which they received no reply.

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Schofield, J. delivered judgment dismissing the application hence this appeal. The issues raised are important involving as they do the determination of the proper procedures to be followed in dealing with letters of request under the Treaty. They are also urgent. An adjournment for one year has been granted in the District Court of New Jersey for the purpose of obtaining the evidence requested. That period ends on April 4, 1991 and it may well be that if the evidence is not by then available the prosecution may be stultified.

Central to the resolution of the issue is whether or not under the provisions of the Law and the Treaty the Authority was under an obligation to consider whether or not the appellants should be granted a hearing - whether oral or written. It is contended for the appellants that there was such an obligation and that in the circumstances of this case that obligation was to grant an oral hearing.

Neither the Treaty nor the Law prescribes the procedure to be followed by the Authority in processing requests. It is common ground that the Authority is under an obligation to act fairly and what this requires must be defined in a situation in which the Treaty and the Law are silent.

In Wiseman v. Borneman [1971] A.C. 297 at p. 308 Lord Reid, discussing the concept of natural justice, then the mere usual terminology for the duty to act fairly, stated :-

> "Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances and I would be sorry to see this fundamental principle degenerate into a series of hard and fast rules. For a long time the Courts have, without objection from Parliament supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation. "

More recently in Lloyd v. McMahon [1987] 1 A.C. 625 at p. 702 Lord Bridge of Harwich adopted the same approach in

broader terms and with perhaps a slightly different emphasis :-

> "My Lords the so called rules of natural justice are not engraved on tablets of stone To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional safeguards as will ensure the attainment of fairness. "

The statutory provisions must thus be the starting point for the inquiry into the procedural requirements which acting fairly require in this case.

The long title states that the Law makes provision for giving effect to the terms of the Treaty the purpose of which was :-

> "improving the effectiveness of the law enforcement authorities of the United States of America and the Cayman Islands in the prosecution and suppression of crime, through co-operation and mutual legal assistance in criminal matters. "

Section 3 states that the Treaty has legal effect in the Cayman Islands.

Article 1[2] of the Treaty enumerates the forms assistance may take. Included are taking the statement or testimony of persons, providing documents, records and articles of evidence, serving documents, locating persons, transferring persons in custody for testimony, executing requests for searches and seizures, immobilizing criminally obtained assets, and assistance in proceedings related to forfeiture, restitution and collection of fines.

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Article 1[3] states :-

> "This Treaty is intended solely for mutual legal assistance between the Parties. The provisions of this Treaty shall not create any right on the part of any private person to obtain, suppress or exclude any evidence, or to impede the execution of a request. "

Article 2 requires each Party to establish a Central Authority and nominates the Attorney-General of the United States or a person designated by him for the United States of America. For the Cayman Islands the Authority is to be the Cayman Mutual Legal Assistance Authority or his nominee. As has been mentioned the Chief Justice acting alone and in an administrative capacity or his nominee is designated under the Law to be the Cayman Mutual Legal Assistance Authority. Requests are to be made by one Central Authority to the other Central Authority.

Article 3[1] excludes from the ambit of the Treaty matters directly or indirectly related to the regulation of taxes with certain specified exceptions and conduct not punishable by imprisonment for more than one year.

Articles 3[2][3] and [4] provide :-

> "2. The Central Authority of the Requested Party may deny assistance where :
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> [a] the request is not made in conformity with the provisions of this Treaty ;
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> [b] the request relates to a political offence or to an offence under military law which would not be an offence under ordinary criminal law; or
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> [c] the request does not establish that there are reasonable grounds for believing :
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> [i] that the criminal offence specified in the request has been committed; and
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> [ii] that the information sought relates to the offence and is located in the territory of the Requested Party.

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3. The Central Authority shall deny assistance where the Attorney-General of the Requested Party has issued a certificate to the effect that the execution of the request is contrary to the public interest of the Requested Party.

4. Before denying assistance pursuant to this Article the Central Authority of the Requested Party shall consult with the Central Authority of the Requesting Party to consider whether assistance can be given subject to such conditions as it deems necessary. If the Requesting party accepts assistance subject to those conditions, it shall comply with the conditions. "

Article 4 deals with the Form and Contents of Requests. It aims at ensuring that full details are supplied of the nature of the information sought, the persons about whom it is sought, the purpose for which it is sought and the manner in which the request is to be executed.

Article 5 deals with the Execution of Requests. the opening sentence of paragraph 1 states :

"The Central Authority of the Requested Party shall promptly execute any request.."

Article 7 provides for limitations on use. Paragraph 1 reads :

"The Requesting Party shall not use any information or evidence obtained under this Treaty for any purposes other than for the investigation, prosecution or suppression in the territory of the Requesting Party of those criminal offences stated in the request without the prior consent of the Requested Party. "

Section 5 of the Law requires the Authority to notify the Attorney-General immediately a request is received and to supply him with copies thereof and any documents relating thereto. It gives the Attorney-General the right to appear amicus curiae and to take part in any proceedings in the Cayman Islands, whether judicial or administrative arising directly or indirectly from the request. There is no mention of notification to the person in respect of whom information is requested.

It may be useful to compare the procedure prescribed under the Law with that which existed under the Confidential Relationships [Preservation] Amendment Law 1979.

Section 3[2][b][iii] provided :-

> "This Law has no application to the seeking divulging, or obtaining of confidential information
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> .....
>
> [b] by or to -
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> .....
>
> [iii] a constable of the rank of Inspector or above, specifically authorised by the Governor in that behalf investigating an offence committed or alleged to have been committed outside the Islands which offence, if committed in the Islands would have been an offence against its laws ..... "

A person so required to divulge information was, however, required by section 3A[1] of the law before doing so to apply for directions.

Section 3A[2] provided :-

> "Application for directions under subsection [1] shall be made to and be heard and determined by a Judge of the Grand Court sitting alone and in camera. At least seven days notice of any such application shall be given to the Attorney-General and, if the Judge so orders to any person in the Islands who is a party to the proceedings in question. The Attorney-General may appear as amicus curiae at the hearing of any such application and any party on whom notice has been served as aforesaid shall be entitled to be heard thereon, either personally or by counsel. "

At that hearing the Judge would decide whether the evidence should or should not be given and if was to be given whether any conditions should be attached. The law applied both to criminal and civil proceedings and section 3A[6] provided as follows :-

> "In considering what order to make under this section a Judge shall have regard to -
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> .....
>
> [c] in any criminal case the requirements of the interests of justice. "

It seems reasonable to infer that the Treaty, the purpose of which was to improve the effectiveness of the law enforcement authorities of both the United States of America and the Cayman Islands in the investigation prosecution and suppression of crime, was designed to provide a far speedier machinery. At the heart of all the legislation in that area lies the need to lift the sanctions which Cayman Islands law imposes to enforce the duty of non-divulgence of information imparted under conditions of professional confidence. Under the procedure laid down in the Confidential Relationships [Preservation] Amendment Law, the Judge of the Grand Court still had vested in him the function of balancing that duty of confidentiality against the requirements of the interests of justice in criminal cases. Under the Law and the Treaty the policy has clearly been adopted that the sanctions imposed to buttress the duty of confidentiality shall give way to the demands for the suppression of crime.

Under the Treaty and the Law, the Authority of the Requested Party may deny assistance only in four cases as has been mentioned - where the request is not made in conformity with the provisions of the Treaty; where the request relates to a political offence or to an offence under military law which is not also an offence under ordinary criminal law; where the request does not establish that there are reasonable grounds for believing that the offence specified has been committed or that the information sought relates to the offence and is located in the Cayman Islands and where the Attorney-General certifies that execution of the request would be contrary to the public interest.

The Authority with the assistance of the Attorney-General, if needed, can no doubt decide whether the request is in conformity with the provisions of the Treaty or whether it is for a political offence or a purely military offence.

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In deciding whether there are 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 him in the request. Clearly he cannot receive evidence to raise doubt as to this. Again these are matters of analysis and inference on which the Authority can competently and accurately arrive at a decision on the documents placed before him.

Those are the conditions prescribed by the legislature of the Cayman Islands for lifting the sanctions which it has imposed to buttress the duty of confidentiality. The Authority in whom has been vested the jurisdiction to decide whether or not these conditions have been fulfilled is empowered to do so after notifying the Attorney-General and hearing him if he wishes to be heard. The Legislature has not provided that the person in respect of whom the information is sought should be heard and there would appear to be no necessity based on the demands of fairness that the courts should supplement the legislative requirements by the requirement that the Authority should decide whether such a person should be heard or not.

The procedure under the Law and the Treaty closely resembles that under the Police and Criminal Evidence Act 1984. Under that Act a constable may obtain access to special procedure material [which includes bank records] by making an application to a circuit judge. If the judge is satisfied that certain access conditions are fulfilled he may make an order under paragraph 4 permitting its examination. Para. 7 of the Schedule prescribing the procedure provided :-

> "An application for an order paragraph 4 above shall be made inter partes."

In Reg. v. Leicester Crown Court ex parte Director of Public Prosecutions [1987] 1 W.L.R. 1371 the Crown Court Judge ruled that since the application was "inter partes" the person affected should be served with notice of the application. The

Director of Public Prosecutions sought judicial review of that ruling. Watkins, L.J. in delivering the judgment of the Divisional Court stressed the undesirability of notifying a suspect of the steps being taken in the course of an investigation thus affording such a suspect the opportunity to conceal or destroy evidence. He went on to state at p. 1374 :

> "However, one has to look at the provisions of the Act and the Schedule already mentioned so as to gather from them, standing by themselves, who is being referred to as a party in paragraph 7 of Schedule 1. It seems to me to be beyond doubt, apart from the reasons which I have already stated, that the only parties referred to in the Act and the Schedule are the police who make the application and the person or institution in whose custody the special procedure material is thought to be. Be it noted that section 9[1] itself refers to a criminal investigation. It does not suggest that there is, even at the time of making the application, a suspected person, let alone a person who has in fact been charged with a criminal offence. "

It should be noted that identically Article 3[2] of the Treaty which prescribes the circumstances in which the Authority may deny assistance makes no mention of a suspected person which is understandable, since the Treaty, like the Police and Criminal Evidence Act, may be brought into operation before a charge is laid and indeed when investigations have just begun.

The decision in the Leicester Crown Court case [supra] was cited with approval in Regina v. Manchester Crown Court Ex parte Taylor [1988] 1 W.L.R. 705.

Accordingly I am satisfied that the approach adopted by the Authority that on a proper construction of the Law and the Treaty the appellants had no right to be heard and the Authority was not obliged to consider whether to extend a hearing to them.

Mr. Potts laid much emphasis on the fact that a criminal trial was actually in progress and that the request for assistance was in the nature of an interlocutory applica-

tion in that hearing. This may well be so from the perspective of the District Court of New Jersey. It is not the position from the perspective of the Authority. The construction of the Law and the Treaty cannot in any way depend on the stage which the investigation may have reached in the law enforcement and judicial systems of the Requesting Party. It would appear from the record that the appellants were served with a copy of the request for assistance and its supporting documentation because the criminal procedure of the Federal Court required this. Unless an appropriate order had been made any evidence obtained as a result of the execution of the request may not have been admissible at the trial. The construction of the Law and the Treaty can in no way depend on this fact.

Since as it appears to me the appellants cannot be parties to the determination as to whether or not assistance should be granted or denied under the Law and Treaty, it follows that the Authority was under no obligation to consider whether he should hear them. The trial judge, in my view, erred in holding that the Authority was bound to give consideration to that matter but that written representations would suffice.

The fact that written representations were submitted and not rejected appears irrelevant to the decision of this case. The circumstances in which this submission came to be made are outlined in paragraphs 5 and 6 of the affidavit of the Attorney-General dated September 19, 1990. It was the view of the Attorney-General that acting fairly involved considering any relevant information brought to his attention though his position remained that there was no right to a hearing.

The decision that there is no obligation to hear the appellants does not appear, in my view, to conflict with the principle laid down by Lord Denning in Reg v. Race Relations Board Ex parte Selvarajan [1975] 1 W.L.R. 1686. He stated at p. 1694 after citing the relevant cases :-

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> "In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends upon the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress or in some way adversely afflicted by the investigation and report then he should be told the case made against him and be afforded a fair opportunity of answering it. "

Of the categories of consequences mentioned above the appellants can conceivably fit only in the final omnibus clause of persons who may be "in some way adversely afflicted by the investigation." It cannot be an affliction to have relevant evidence adduced by the prosecution at one's trial. The "affliction" can only be the rummaging into one's affairs as a result of the execution of the request by the Authority. The nature of the duty of confidentiality will be considered more fully while resolving the issue of retrospectivity. It can be said, in brief, however, that the Authority could do no more than ensure that the conditions prescribed by the Legislature for lifting the sanctions which the Legislature had imposed to prohibit breaches of confidence had been fulfilled. The duty of confidentiality owed to the appellants was always subject to compulsion by law. In my view the appellants have not been adversely afflicted and the principle does not apply.

The principles enunciated in Public Disclosure Commission v. Isaacs [1988] 1 W.L.R. 1043 appear to me to reinforce that view. The respondent in that matter had laid a complaint against the Prime Minister of the Bahamas in respect of his returns under the Public Disclosure Act. The appellant Commission had called on the Prime Minister for his explanations. Having received the Prime Minister's explanations the Commission found the complaint had not been substantiated and dismissed it. It could alternatively have found that the complaint was groundless in which event the respondent could have been prosecuted.

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In the judgment of the Privy Council delivered by Lord Bridge of Harwich, he noted that the Court of Appeal in granting the declarations sought by the respondent had relied on the passage in Reg v. Race Relations Board ex parte Selvarajan [supra] cited above and continued at p. 1049 :-

> "With respect to the Court of Appeal, their Lordships do not think that this principle has any application to a complainant under the Act of 1976, save in the case already considered and not here applicable where the commission are minded to report to the Attorney-General under section 8[3] that the complaint was groundless. In any other case the complainant is not liable to be subjected to any pains or penalties or exposed to prosecution. "

The decision thus makes clear that while the respondent would have been entitled to an oral hearing had his complaint been found groundless, he was not entitled to any hearing at all if it was merely found to be unsubstantiated. This does not mean that the Commission could not have called upon him if it so wished. But it was not in law obliged to do so, was under no obligation to consider whether it should do so or not and had not fallen into error in failing to do so.

Accordingly, this appeal, insofar as it hinges on failure to act fairly, cannot succeed.

The second issue raises the question of retrospectivity. It is contended that the Authority cannot afford assistance to the United States Authority by compelling the disclosure of information obtained by a person before the operative date of the Law.

The Treaty itself was signed on July 3, 1986 and ratified by the United Kingdom and the Cayman Islands that very year. The Law was also passed in 1986. The Governor assented to it on November 5, 1986 but it was not to come

into force until a day to be proclaimed by him in the Official Gazette. The United States did not immediately ratify. Instruments of ratification bringing the Treaty into force were not exchanged until mid-March 1990. The Governor proclaimed March 29, 1990 as the date on which the Law was to come into force. If the contention is correct, the Authority cannot validly execute a request for assistance requiring the disclosure of information given and received prior to that date.

It was submitted that the language of the Law and the Treaty is not retrospective. Section 3 of the Law provides that mutual assistance is provided between the authorities in the United States and in the Cayman Islands :-

> "for the suppression of criminal offences of the nature and in the circumstances provided in the Treaty".

"Criminal offence" is defined in Article 19[3] of the Treaty. The definition is long and need be quoted only in part :-

> "'Criminal offence' which except in the case of any matter falling within sub-paragraphs [d] and [e] of this definition, does not include any conduct which relates directly or indirectly to the regulation, imposition, calculation or collection of taxes, but subject always to those exclusions, means
>
> [a] any conduct punishable by more than one year's imprisonment under the laws of both the Requesting and Requested Parties ;
>
> ..... "

Thereafter there follows an enumeration of offences denoted under sub-paragraphs [b] to [l] beginning with "racketeering" [one of the counts in the indictments which the appellants are to answer] which are not criminal offences under Cayman Islands law at least not by the names under which they are listed. Each of these offences is defined and it may be that in some cases the conduct so defined could constitute an offence under Cayman Islands law by another name.

The argument is that the term "criminal offence" has been made a term of art. Until the Law and the Treaty came into force there was no conduct to which its provisions could apply because the category which it created did not exist.

The argument, in my view, places far too great an emphasis on the concept of categorization. Though the category did not exist, each of its constituent elements did exist as crimes either in both the Cayman Islands and the United States of America or in the United States of America alone. Thus under the category of conduct punishable by more than one year's imprisonment under the laws of the Requesting and the Requested Parties would fall murder and rape. These were criminal offences in both places. It seems inconceivable that the language of the Law and the Treaty should require that such conduct could legally be the subject of a request if the murder or rape took place after March 29, 1990 but not to an ongoing investigation in which the murder and rape had taken place on March 1, 1990. There is no reason why such a construction should be adopted aimed at frustrating the intent of the Treaty - which is the desire :-

> "to improve the effectiveness of the law enforcement authorities of both the United States of America and the Cayman Islands in the investigation, prosecution and suppression of crime through co-operation and mutual legal assistance in criminal matters."

The second submission was based on the analysis of retrospectivity in Yew Bon Tew v Kenderan Bas Mara [1983] A.C. 553. In that case the appellants were injured by a bus belonging to the respondent, a public authority which operated a bus service. At the date of the accident the relevant law provided that actions against public authorities in respect of any neglect or default on their part in the performance of their public functions had to be brought within twelve months.

Some time, after a year from the date of the accident, no action having yet been brought by the appellants, the law was amended and the period within which such actions could be brought was fixed at three years. The appellants filed their claim within the period of three years from the date of the accident. It was held in the Privy Council that the respondent's plea that the action was statute barred should succeed.

Lord Brightman delivering the judgment of the Privy Council stated at p. 563 :-

> "Their Lordships consider that the proper approach to the construction of the Act of 1974 is not to decide what label to apply to it, procedural or otherwise, but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations ... In their Lordships' view, an accrued right to plead a time bar which is acquired after the lapse of a statutory period, is in every sense a right, even though it arises under an act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable. Their Lordships see no compelling reason for concluding that the respondents acquired no "right" when the period prescribed by the Ordinance of 1948 expired, merely because the Ordinance of 1948 and the Act of 1974 are procedural in character. "

In much the same way it is contended on behalf of the appellants that they acquired a right to have the confidentiality of information given and received prior to March 30, 1990 preserved and the Law coming into force on that day should not be allowed to affect that vested right. The nature of that right must, therefore, be analysed.

The exact nature of the relationship between the appellants and each of the numerous entities named in the request for assistance from whom information was sought has not been spelt out but it is clear that they were mainly banks and trust companies. The appeal was argued on that basis.

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As has been mentioned, the scope of the duty of confidentiality between banker and client has been succinctly defined in the well-known passage of the judgment of Bankes, L.J. in Tournier v National Provincial and Union Bank of England [supra] at pp. 472-3 :-

> "In my opinion it is necessary in a case like the present to direct the jury what are the limits and what are the qualifications of the contractual duty of secrecy implied in the relation of banker and customer. There appears to be no authority on the point. On principle, I think that the qualifications can be classified under four heads : [a] where disclosure is under compulsion of law; [b] where there is a duty to the public to disclose; [c] where the interests of the bank require disclosure; [d] where the disclosure is made by the express or implied consent of the customer. "

This would have been the position at common law in the Cayman Islands.

In 1976 the Confidential Relationships [Preservation] Law came into force.

Section 5 of that law specifically preserved that rule. It provided :-

> "Nothing in this Law shall by implication be deemed to derogate from the rule in Tournier v National Provincial and Union Bank of England [1924] 1 K.B., 461 [which deals with the civil duty of banks to preserve the confidentiality of the businessof their customers] which rule is declared to have application to the Islands. "

This law, therefore, while imposing criminal sanctions for the divulgence of information imparted under conditions of professional confidence express or implied, left the position at common law untouched and indeed fortified by statutory declaration.

In 1979 the Confidential Relationships [Preservation] [Amendment] Law was passed. Section 5 of the principal law was repealed. The Amendment did not, however, purport to define the limits and qualifications of the contractual duty of secrecy implied in the relation of banker and customer. Like the principal law it was concerned with sanctions and defining situations in which disclosure could be made without incurring sanctions. A procedure was also prescribed which had to be followed.

Section 3[2] of the amendment provided :-

> "The Law has no application to the seeking, divulging or obtaining, of confidential information -
>
> [a] in compliance with the directions of the Grand Court pursuant to section 3A ;
>
> [b] by or to -
>
> [i] any professional person acting in the normal course of business or with the consent, express or implied, of the relevant principal ;
>
> [ii] a constable of the rank of Inspector or above investigating an offence committed or alleged to have been committed within the jurisdiction ;
>
> [iii] a constable of the rank of Inspector or above, specifically authorised by the Governor in that behalf, investigating an offence committed or alleged to have been committed outside the Islands which offence, if committed in the Islands, would be an offence against its laws ;
>
> [iv] the Financial Secretary, the Inspector, or in relation to particular information specified by the Governor, such other person as the Governor may authorise ;

[v] a Bank in any proceedings, cause or matter when and to the extent to which it is reasonably necessary for the protection of the bank's interest, either as against its customers or as against third parties in respect of transactions of the bank for, or with, its customer ;

[vi] the relevant professional person with the approval of the Financial Secretary when necessary for the protection of himself or any other person against crime; or

[c] in accordance with the provisions of this or any other law.

Section 3A referred to in section 3[2][a] provided that any person :

> "required to give evidence in, or in connection with any proceeding being tried, inquired into or determined by any court, tribunal or other authority [whether within or without the islands] any confidential information within the meaning of this Law, he shall before so doing apply for directions and any adjournment necessary for that purpose may be granted. "

As has already been mentioned the application must be made to a Judge of the Grand Court.

The repeal of Section 5 declaring the rule in Tournier v National Provincial and Union Bank of England [supra] to have application in the Cayman does not, in my view, affect the applicability of the rule as a definition of the extent of a banker's duty for confidentiality and the limitations thereon. The amended law retained the character of the principal law - the imposition of sanctions - and established no civil right. Any breach of confidentiality which the appellants can lay claim to can only derive from the principles set out in Tournier's case.

This was recently considered by the Court of Appeal in Barclay's Bank PLC [Trading as Barclay Card] v Taylor [1989] 1 W.L.R. 1066. The police had served notice on the Bank to permit access to the defendant's account pursuant to the

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Police and Criminal Evidence Act 1984. The Bank took no steps on receiving the notice but gave disclosure in compliance with the orders when made. Later the Bank sued the defendant for sums due on his account with them and the defendant counter-claimed alleging that the Bank was in breach of its duty of confidentiality in that it had among other matters, failed to notify the defendant of the making of the application, failed to oppose the making of the access order, failed to make any representations as to the scope of the order and failed to notify the defendants that the orders had been made. The Bank applied to have the counterclaim struck out as disclosing no cause of action and succeeded both at first instance and on appeal.

Lord Donaldson of Lymington, MR. stated at p. 1074 :-

> "The duty to maintain confidentiality is not all embracing subject to exceptions. It does not exist in the four exceptional circumstances and it is no part of the duty of confidentiality to seek to avoid disclosure under compulsion. "

Where there is compulsion of law the duty does not exist and there is no vested right of confidentiality. The analysis by Schofield, J. of the law on this matter does appear to me, with respect, to be quite accurate. Under the principles in Tournier which are applicable here, the duty did not exist where there was compulsion of law and the circumstances under which this compulsion may be exerted may from time to time be changed without any derogation from the principle. It should be noted that the Confidential Relationships [Preservation] [Amendment] Law dealing as it does only with sanctions recognizes this position. The last mentioned circumstance in which it is specified that the law has no application in relation to the divulging of confidential information is by section 3[2][c] :

> "in accordance with this or any other Law"

/ .....

This appears to me clearly to indicate that the law contemplated situations which might arise where some law, other than the Confidential Relationships [Preservation][Amendment] Law, might compel disclosure. The formulation of the civil liability for improper disclosure is no different.

Accordingly there was no vested right of confidentiality with which the Treaty and the Law interfered. The principle enunciated in Yew Bon Tew v Kenderan Bas Mara [supra] has no application.

The appeal should, therefore, in my view be dismissed with costs to the respondents.