IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

C 407 OF 1989

10-07-90

BETWEEN:	RICHARD O. BERTOLI LEO M. EISENBERG RICHARD S. CANNISTRARO	PLAINTIFFS
AND:	SIR DENIS MALONE in his capacity as the Cayman Mutual Legal Assistance Authority pursuant to Section 4 of the Mutual Legal Assistance (United States of America) Law 1986.	DEFENDANT

Mr. Robin Potts Q.C., with
Mr. Charles Quin - for the Plaintiffs

Mr. Richard Ground Q.C., with
Mr. Richard Finlay - for the Defendant

JUDGMENT

SCHOFIELD J.

On 11th December, 1989, the plaintiffs filed a writ of summons against Richard R. Thornberg, the Attorney General of the United States of America, Samuel Alito, United States Attorney for the District of New Jersey, Robert Warren, Assistant United States Attorney, and David Rosenfield, Special Assistant United States Attorney. The plaintiffs are the defendants in a criminal case before the United States District Court of New Jersey wherein it is alleged that the plaintiffs have been guilty of racketeering and related offences. The prosecuting authorities in the United States were making an application to the trial judge for an order requesting the Grand Court of the Cayman Islands to make such orders as were necessary and appropriate under the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order, 1978, with a view to securing the taking of evidence and the production of documents in furtherance of the prosecution. However one paragraph of the application to the District Judge in New Jersey was to the following effect:

> "The Defendants herein (ie the plaintiffs to this suit) may not challenge either this Court order or the letter of request in any proceedings before the Grand Court of the Cayman Islands ...."

In the endorsement to the writ the plaintiffs sought a declaration that in any such application to this Court the plaintiffs were entitled and had a legal right to be heard and, further, an injunction restraining the defendants from making an application to this Court under the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order, 1978, which denied the plaintiffs the right to challenge the application or any proceedings thereon in this Court.

On the 4th January, 1990, the plaintiffs presented an ex parte application for interlocutory relief in terms of the prayers in the endorsement to the writ, and affidavits were filed to the effect that the offending paragraph above was not included in the draft request to be submitted to this Court. If, therefore, an order were made by the District Judge in New Jersey denying the plaintiffs access to the Grand Court of the Cayman Islands the Grand Court would not have been made aware of that fact. Furthermore, it was argued that if service of the interlocutory application were effected on the four then defendants to this suit they may cross-apply to the United States District Court for an order prohibiting the application in this Court from proceeding. On those bases I granted an interlocutory injunction restraining the defendants from making any such application which denied the plaintiffs the right to challenge the application or the proceedings under the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order, 1978. Leave was issued to serve out of the jurisdiction and liberty to apply was granted to the defendants. No application was ever made to set aside that interlocutory injunction although, as will be seen, the action against the four defendants and my order based upon it were misconceived.

The defendants instead proceeded with a request under the Mutual Legal Assistance (United States of America) Law, 1986. The Mutual Legal Assistance Treaty between the United States of America and the United Kingdom, including the Cayman Islands, (hereinafter called "the Treaty") was ratified in March 1990 and the Mutual Legal Assistance (United States of America) Law, 1986,

(hereinafter called "the Law") giving effect to the Treaty, came into operation at the end of that month. The Treaty provides, in Article 1, that the Governments of the United States and of the Cayman Islands shall provide mutual assistance, in accordance with the provisions of the Treaty, for the investigation, prosecution, and suppression of criminal offences. Each Government established a Central Authority through which such assistance is sought and given, and in the Cayman Islands such Central Authority (hereinafter called "the Authority") is, by section 4 of the Law, the Chief Justice or another Judge of the Grand Court designated by him. The request for assistance in this case was thus made by the United States Authority to the remaining the defendant to this suit as the Authority.

An ex parte summons was filed on 10th May, 1990, by the plaintiffs seeking that Drew C. Arena, who had been designated as the United States Central Authority, be added as the fifth defendant and that the Cayman Authority be added as the sixth defendant. The summons also sought amendments to the original writ of summons to include reference to the request being made to the Authority under the Law and included a prayer that the amended writ be reissued and that the writ and summons be served outside the jurisdiction. Those prayers were granted.

On an undertaking by the Authority that no information would be divulged to the United States Authority pursuant to the request until the suit had been heard further prayers in the summons for temporary injunctions against the defendants were adjourned and it was agreed that an early hearing of the substantive application was desirable.

Immediately prior to the hearing of the suit I was faced with two summonses filed by the Attorney General who by this stage of proceedings represented all six defendants. The first summons was an ex parte summons pursuant to Rule 16(5) of the Grand Court (Civil Procedure) Rules for leave to enter a conditional appearance on behalf of all six defendants. That was granted. The second summons, inter partes, sought orders inter

alia for the striking out of the endorsements and amended endorsements to the writ pursuant to Rule 41(1)(d) of those Rules as against all defendants as being an abuse of the process of the Court. After hearing argument I struck out the proceedings as against the first five defendants, leaving the sixth defendant, the Authority, as the only defendant. Because the application raised a point of substance I decided to give my reasons for that decision in this judgment.

The State Immunity Act, 1978, of the United Kingdom, has been extended to the Cayman Islands by S.I. 458 of 1979. Section 1 of the Act reads :-

> "1. (1) A State is immune from the jurisdiction of the Courts of the (Cayman Islands) except as provided in the following provisions of this Part of this Act.
>
> (2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question."

Section 14(1) of the Act provides:

> "14. (1) The immunities and privileges conferred by this Part of the Act apply to any foreign or Commonwealth State other than the (Cayman Islands) and references to a State include references to
>
> (a) the sovereign or other head of that State in his public capacity;
>
> (b) the government of that State; and
>
> (c) any department of that government
>
> but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organ of the government of the State and capable of suing or being sued."

The first five defendants were all officers in the Justice Department of the United States of America, indeed the first defendant was the United States Attorney General himself. They were being sued in their official capacities with a view to controlling or declaring upon the exercise of their official functions. In truth the Department of the Attorney General was being sued and it cannot be open to the plaintiffs to avoid the immunity from action provided to that Department by the State

Immunity Act, 1978, simply by identifying individuals in the Department who are performing the functions which they seek to control. To do so is an abuse of the process of the Court. An illustration of the inappropriateness of permitting the plaintiffs to sue individuals in a government department is if successive officers dealing with the subject-matter of the suit leave the department and their file is handed over to other officers. Are the successive holders of the relevant file to be followed and added as defendants? For those reasons I struck out the first five defendants from these proceedings.

As to my injunction of the 4th January, 1990, attached to the first four defendants only, it follows that it is thus discharged. It also follows that as the Authority has no jurisdiction over any application or request made under the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order, 1978, all reference to any application under that Order should be deleted from the endorsement to the amended writ of summons. I so ordered.

So a writ issued against the Attorney General of the United States of America and various of his officers to prevent them from making an application under the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order, 1978, without the plaintiff having a right to be heard has ended its life as a claim against the Authority for the following declarations:-

(1) that in any application or request to the Authority being made by the former defendants under the Law by or pursuant to a request from the United States Central Authority the plaintiffs are entitled and have a legal right to be heard and oppose the application;

(2) that any steps taken or hereafter taken by the Authority to execute a request dated the 4th April, 1990, by the United States Authority are and will be ultra vires the Authority and void and of no effect.

Prayer (2) in the amended endorsement, for an injunction, was abandoned at the hearing. It is as well to note here that the Authority has already taken some action on the request from the United States Authority dated 4th April, 1990.

There are two further points I should mention before turning to the issues. Firstly, I agree with the Attorney General that the Authority should not have been made a defendant to these proceedings; the defendant should have been the Attorney General himself (see section 11(2) Crown Proceedings Law). However, he decided to make no issue of the point in the interests of expediting the trial of the real issues.

Secondly, the defendant to this suit is still named as the Chief Justice of these Islands, albeit acting as the Authority. At one stage I voiced doubt over whether I should be asked to make orders against a Judge of this Court, but both parties agreed I have jurisdiction in the matter. Of course they are right, and I am exercising jurisdiction not over a Judge of this Court but over an Authority exercising functions outside the Grand Court. It does not seem right that I am placed in the position of reviewing the legality of the decision of a Judge of this Court even when he is acting in another capacity. The inappropriateness of this situation illustrates the dangers inherent in investing a Judge with executive powers. The mantle of executive power does not always rest comfortably on the shoulders of a member of the judiciary. But in the case of the Law and the Treaty, no doubt for good reason, the Legislature has given that mantle to the Chief Justice or any other Judge of this Court designated by him. The point I make is, that faced as I am with the duty of reviewing the decision of the Authority, I shall treat it as any other case which is before me. Any feeling of discomfort I may have in exercising this jurisdiction must be subordinated to the interests of an impartial dispensation of justice according to law.

There are two issues in this suit, identified and argued by the parties. They are :

(1) Whether the plaintiffs should have been given the opportunity by the Cayman Authority to make oral representations before him;

(2) Whether the Mutual Legal Assistance (United States of America) Law, 1986, operates with retrospective effect.

By section 4 of the Law, the Authority exercises his functions in an administrative capacity. That of course does not mean that his functions under the Law and the Treaty are all administrative in nature, and indeed if one were to adopt out-of-date phraseology one would say they are quasi-judicial. Be that as it may the Law declares he acts in an administrative capacity. However, there is no doubt that the exercise of the Authority's functions are subject to review by the Grand Court and that the Authority has a duty to observe the principles of natural justice: see Ridge v Baldwin [1964] A.C. 40. Later cases have equated the principles of natural justice to the duty to act fairly (see the judgment of Lord Scarman in Council of Civil Service Union v Minister for the Civil Service [1985] A.C. 374 at p. 407)

The question I have to decide is whether natural justice or fairness demands that the plaintiffs should have a right to an oral hearing before the Authority.

Lord Reid in Ridge v Baldwin (supra) discussed the confusion in the earlier authorities on the applicability of the principles of natural justice, confusion which that decision did much to remove. He had this to say (at p.65):

> "It appears to me that one reason why the authorities on natural justice have been found difficult to reconcile is that insufficient attention has been paid to the great difference between various kinds of cases in which it has been sought to apply the principle. What a minister ought to do in considering objection to a scheme may be very different from what a watch committee ought to do in considering whether to dismiss a chief constable."

These words of Lord Denning M.R. in Reg. v Race Relations Board Ex parte Selvarajan [1975] 1 W.L.R. 1686, 1693-1694, were repeated by the Privy Council in Public Disclosure Commission v Isaacs [1988] 1 W.L.R. 1043:

> "In recent years we have had to consider the procedure of bodies who are required to make an investigation and form an opinion.... 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

Justice to act on his behalf."

Chief Justice Marshall delivered the opinion of the Court. "Under the authority given to the President by the Militia Act of 1795, he may call forth the militia to execute the laws of the Union, suppress insurrections and repel invasions. Congress has the power to provide for organizing the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress."

Section 4 of the Militia Act of 1795 provides:

"4. For the purpose of ascertaining the number of persons liable to perform military service, the Commissioners of the several districts shall, within one month after the passing of this act, proceed to take a list of the whole number of persons within their districts, who are liable to perform military service, and shall make return thereof to the President of the United States within six months from the passing of this act."

The constitutionality of this provision was challenged by the Chief Justice, who argued that the power to call forth the militia was limited to three circumstances: to execute the laws of the Union, to suppress insurrections, and to repel invasions. He contended that the power to provide for organizing the militia did not include the power to compel citizens to perform military service.

The majority of the Court, however, held that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Johnson, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Story, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Duvall, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Livingston, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Thompson, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Todd, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Trimble, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Washington, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Wayne, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Woodbury, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Wright, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Yates, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Zane, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Adams, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Brown, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Clark, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Davis, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Evans, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Fuller, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Gray, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Hughes, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Iredell, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Jackson, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Kent, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Livingston, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Marshall, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Nelson, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Owen, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Paterson, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Quincy, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Randolph, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Story, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Thompson, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

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Justice Trimble, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Washington, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Wayne, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Woodbury, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Wright, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Yates, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Zane, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Adams, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Brown, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Clark, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Davis, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Evans, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Fuller, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Gray, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Hughes, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Iredell, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Jackson, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Kent, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Livingston, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

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Justice Owen, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Paterson, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Quincy, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Randolph, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Story, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Thompson, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Todd, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Trimble, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

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Justice Woodbury, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Wright, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Yates, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

Justice Zane, in a concurring opinion, argued that the power to call forth the militia was not limited to the three circumstances enumerated by the Chief Justice, but included the power to provide for organizing the militia, and that the power to compel citizens to perform military service was a necessary and proper means of executing the power to call forth the militia.

The Authority cannot therefore draw to himself a committee; he acts alone. That he is to act in an administrative capacity demonstrates that he is not expected to hold a judicial enquiry or anything in the nature of a trial when exercising his functions. A request is to be promptly executed and its outcome promptly communicated (see Article 5 of the Treaty). A speedy process is thus envisaged.

What kind of decision has the Authority to make in this case? The request is in writing pursuant to Article 4 of the Treaty. The specific documents sought and the witnesses whose evidence is sought to be identified (and this request involves a substantial number of documents and witnesses) are set out in the appendices to the request. The Authority, if he grants the request, is required to ensure that the witnesses appear to testify and produce the documents before a special master who will administer oaths and examine the witnesses. The United States Authority suggests that the special master be a named Judge of the District of Columbia Court of Appeals. There are alternatives referred to in the request. The testimony of the witnesses and the production of the documents are to be recorded by audio-visual means and recorded by a stenographer. The audio-visual record and the stenographic transcripts are to be returned to the United States Court for use in the criminal proceedings. The request provides for the plaintiffs' attorneys to have advance sight of the documents. The attorneys are permitted to be present when the witnesses testify and the documents are produced. It is clear from the request that documents are to be presented formally to the special master by individuals or bodies identified in an appendix to the request. Witnesses may be examined upon areas listed in an appendix and proceedings are to be governed by the evidentiary and procedural rules of the United States District Court but any questions of privilege under Cayman Islands law are to be decided by the judicial authorities of the Cayman Islands. Quite how this is to be effected is uncertain, but the point I make is that the request clearly contemplates that points of evidence and procedure can be raised and matters of privilege can be protected

by the attorneys who appear before the special master. If there are any points to be raised about admissibility of any evidence or about privilege, they can be raised by the plaintiffs' attorneys before him.

Clearly then it would be a duplication for these same points to be canvassed before the Authority and outside the scope of the Authority's duties under the Law and Treaty. In any case on the limited written information before him how could the Authority determine questions of admissibility of evidence which is to be tendered to a foreign jurisdiction? The most that the plaintiffs could expect to do is make submissions on the Authority's determination on whether to exercise his discretion to grant or deny assistance. It seems that the discretion to refuse a request is limited. By section 3 of the Law the Treaty has legal effect in these Islands. Article 1 of the Treaty obliges the Authority to provide assistance in the circumstance set out in the Treaty. The limitations on granting such assistance are spelled out in Article 3. As I read it unless a request falls within any of the areas of limitation as provided for in Article 3 then the request must be granted.

Articles 3.1 and 3.3 do not apply to this request. Article 3.2 reads:

"The Central Authority of the Requested Party may deny assistance where:

(a) the request is not made in conformity with the provisions of this Treaty;

(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

(c) the request does not establish that there are reasonable grounds for believing:
(i) that the criminal offence specified in the request has been committed; and
(ii) that the information sought relates to the offence and is located in the territory of the Requested Party."

Any decision to deny assistance under this Article is made by reference only to the contents of the request. It seems, for example, that questions of admissibility of any of the

documents sought by the request does not come within the purview of the Authority. The request is made in writing. Is it unreasonable or unfair to conclude that any representations which the plaintiffs could make to the Authority in relation to the exercise of his discretion would be adequately communicated in writing?

Let us now turn to the third of Lord Bridge's criteria, that is the statutory framework under which the Authority operates.

As stated above the Authority's duties in determining whether to grant assistance under a request are limited by the terms of the Treaty. The extent of the Authority's duty when a request is made is to ensure that the request falls within the scope of the Treaty and does not fall within any of the areas of limitation. Furthermore, before denying a request the Authority shall consult with the requesting Authority to consider whether assistance can be given subject to such conditions as the Authority deems necessary.

Article 1.3 of the Treaty reads:

> "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."

This Article does not go so far as to preclude a private person affected by the request from making representations in connection with a request of which he has notice. What it most certainly does not do is grant such a person a right to make oral representation to the Authority.

The whole tenor of the Law and the Treaty is that the request is a matter between the requesting and the requested Authorities. Requests of many different kinds can be acticipated at various stages of investigation or prosecution. It is not difficult to imagine that many types of requests do not call for any kind of representation by third parties. For example, in

certain cases confidentiality is necessary and the persons affected by the request will not even know about it. It would be certainly unwise and unnecessary to give a person being investigated early warning of such investigations so as to enable him to disappear or dispose of exhibits. However, there will be some cases, such as the present, where it is considered appropriate to give advance notice of a request. The Authority must have a discretion in relation to the procedure he adopts and, given the nature of the request, whether to permit representations, oral or written.

To my mind, the character of the Authority, the kind of decision he has to make and the statutory framework in which he operates require no more of him, on this particular request, than to consider written representations from the parties affected by the request. It is not unfair for him to deny the plaintiffs the opportunity of making oral representations.

For the Authority to make an absolute and rigid rule that he will never grant an oral hearing to a person affected by his decision would be a denial of the discretion which he obviously has. Plaintiffs' counsel argues that if the Authority has laid down such an absolute and rigid rule then any decision which has been made in the present case is a nullity.

In Prendergast v. Police Commissioner and another (C.C. 244/89) this Court had to decide whether a police constable had a right to be represented by counsel in disciplinary proceedings against him under the Police Law and Regulations. I adopted the following passage from the judgment of Lord Denning M.R. in Enderby Town Football Club Ltd v Football Association Ltd [1971] Ch 591, at page 605:

> "This case thus raises this important point: is a party who is charged before a domestic tribunal entitled as of right to be legally represented? Much depends on what the rules say about it. When the rules say nothing, then the party has no

> absolute right to be legally represented. It is a matter for the discretion of the tribunal. They are masters of their own procedure: and, if they, in the proper exercise of their discretion, decline to allow legal representation, the courts will not interfere. Such was held in the old days in a case about magistrates: see Collier v Hicks (1831) 2 B & Ad 663. It is the position today in the tribunals under the Tribunals and Inquiries (Evidence) Act, 1921. I think the same should apply to domestic tribunals, and for this reason: In many cases it may be a good thing for the proceedings of a domestic tribunal to be conducted informally without legal representation. Justice can often be done in them better by a good layman than by a bad lawyer. This is especially so in activities like football and other sports, where no points of law are likely to arise, and it is all part of the proper regulation of the game. But I would emphasise that the discretion must be properly exercised. The tribunal must not fetter its discretion by rigid bonds. A domestic tribunal is not at liberty to lay down an absolute rule: 'We will never allow anyone to have a lawyer to appear for him'. The tribunal must be ready, in a proper case, to allow it."

I went on to point out that any discretion may be removed by the rules of the tribunal itself or by legislation, and it is noteworthy that Lord Denning's view (expressed at page 607) was that even if the rules of the tribunal prohibited legal representation the rules would only be valid if they are construed as directory and not imperative. By analogy it would be improper for the Authority to state: "I will never allow anyone to make oral representations to me." There have been laid down no formal rules governing the procedure of the Authority and the legislation does not preclude oral representations being made.

But has the Authority laid down an absolute rule that he will never permit oral representations or has he just denied an oral hearing in this particular case? A review of the Authority's written submissions as presented by the Attorney General (and no doubt on full instructions from the Authority) do not reveal that such a rigid rule has been made. The relevant submissions are:

> "(e) Central Authorities under treaties of this nature are one of a class of decision-makers who are not under a duty to hear persons affected. Put another way their functions do not require them to hear such persons.

> (f) Where there is no duty to hear there is no right to be heard and the Plaintiff(s) cannot demand a hearing or apply to set aside a decision rendered in the absence of a hearing. Put another way, the Plaintiffs have no locus standi to move the court in this matter."

By referring to the rights of the plaintiffs these submissions echo the wording of Article 1.3 of the Treaty, but I cannot read them as stating that the Authority will never receive representations or hear oral representations. To deny that an affected party has a right to be heard is a far cry from denying the possibility that he will be granted a hearing in an appropriate case. Indeed by the time those submissions were presented to the court, the Authority had not formally been asked to grant an oral hearing. I am aware of the plaintiffs' belief that they should have been invited to make representations, but it was only during the first day of the hearing that a formal request to the Authority for a hearing was made by them. I have, indeed, reviewed all the correspondence tendered in evidence and can find no statement on behalf of the Authority that he has laid down a rule to be applied in every case.

On the third day of the hearing I asked counsel whether the plaintiffs had tendered to the Authority in writing the full representations they wished to make on the Treaty request. An adjournment was granted to enable their attorney to prepare such representations and for the Authority to consider them. The Authority, through the Attorney General, agreed to consider such representations. The Attorney General then wrote to the plaintiffs' attorney on the same day in these terms:

> "Since the adjournment this morning we have given this matter further careful consideration, as a result of which we have come to the conclusion that, in fact, the adjournment may not serve any useful purpose.
>
> The adjournment arises out of the assurance on behalf of the Cayman Authority that it would give due and proper consideration to any material fact which came to its notice, including a written representation. However, for the avoidance of doubt, we do not consider that that carries with it the right to receive notice of the ultimate determination of the Authority upon the request, or the reasons for it. We also do not consider that it gives rise to any expectation in that regard. The ultimate disposition of the request is purely a

> matter between the Central Authorities of the contracting States.
>
> It seems to us that you either accept that, and are satisfied with the opportunity to put your points to the Cayman Authority for its consideration, or you will want more. If the former that is the end of the matter. If the latter, it seems that the adjournment will serve no useful purpose. We should make it quite plain that this in no way derogates from the assurance that any representations your clients may make will be given fair and careful consideration by the Authority.
>
> Although it is a matter for you, in the circumstances you may consider it preferable to ask the judge to continue tomorrow. We would certainly concur with that."

Clearly by allowing such written representations to be made and by considering them the Authority was exercising his discretion to hear from a person other than the requesting Authority. The Authority was not shutting the door to the plaintiffs. I can well understand the Authority's reluctance to give reasons for his decision and I do not consider it unfair that his reasons be withheld from the plaintiffs. However, I find it difficult to accept that the Authority was acting fairly in refusing to communicate his decision to the plaintiffs. If communication of the decision were made the plaintiffs would be in a position to know what course to then take. Say, for example, the Authority were to refuse the request because of the representations. The plaintiffs would know of the position and be able, if appropriate, to discharge their Cayman attorney and concentrate their attention on the proceedings in the United States of America. Be that as it may, I am unable to say that such refusal to communicate the decision in itself renders the decision a nullity. I must consider whether the contents of the letter set out above demonstrate that the Authority has embarked on a rigid policy never to grant an oral hearing to an affected party. In defending the Authority's decision not to communicate with the plaintiffs the Attorney General came perilously close to arguing that such a position would be valid, but he did stop short of so indicating.

This case must be viewed in context. It is a case which arises out of the first Treaty request under this Law which only

became operative on 31st March 1990. These are entirely new powers under a Law the likes of which have never been administered in these Islands. Whilst the duties of the Authority acting under the Law and the Treaty are limited in scope by the Law and the Treaty themselves there is no procedure laid down for the consideration of a request and the types of request which the Authority may face are extremely wide and varied. I refer again to Article 1 of the Treaty, paragraphs 1 and 2 of which read:

> "1. The Parties shall provide mutual assistance, in accordance with the provisions of this Treaty, for the investigation, prosecution and suppression of criminal offences of the nature and in the circumstances set out in this Treaty, including the civil and administrative proceedings referred to in paragraph 3(c) of Article 19.
>
> 2. For the purposes of paragraph 1, assistance shall include:
> (a) taking the testimony or statement of persons:
> (b) providing documents, records, and articles of evidence;
> (c) serving documents:
> (d) locating persons:
> (e) transferring persons in custody for testimony:
> (f) executing requests for searches and seizures;
> (g) immobilizing criminally obtained assets;
> (h) assistance in proceedings related to forfeiture, restitution and collection of fines; and
> (i) any other steps deemed appropriate by both Central Authorities."

In <u>Re Pergamon Press Ltd</u> [1971] Ch 388, 403 Sachs LJ. said:

> "In the application of the concept of fair play, there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand."

The varied nature of the types of request which the Authority will have to consider demands great flexibility of approach. It is, indeed, difficult to imagine the different permutations of request and what procedures will be necessary to meet them. I cannot think that the Authority is unaware of this.

As I see the Authority's position, gleaned from the correspondence and the submissions, he is endeavouring to

formulate a policy on the procedure which he will apply to the type of request he is dealing with in this case and which is consistent with his duties under the Law and Treaty. There is nothing wrong with an administrative body, in the honest exercise of its discretion, laying down a policy, procedural or otherwise, and announcing that policy to all those concerned, so long as it is ready to listen to reasons why, in an exceptional case, that policy should not be applied. I am unable to reach a conclusion that the Authority's position is so rigidly stated as to demonstrate that he has denied his own discretion. The plaintiffs have not satisfied me that any decision thus-far made on the request involved a denial by the Authority of any discretion he has.

The last point to be considered on the natural justice issue is that first argued. That the Authority was not made aware of all factors which may affect his decision on whether to grant an oral hearing and therefore his decision cannot stand. I was referred to the oft-quoted passage from the judgment of Lord Greene M.R. in <u>Associated Provincial Picture Houses Ltd v. Wednesbury Corporation</u> [1948] 1 K.B. 223,229:

> "...... a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider."

What are the matters which it is said that the Authority did not consider? That the plaintiffs had been served with a copy of the request and all the accompanying documents. That a letter of request had previously been applied for under the Evidence (Proceedings in Other Jurisdiction) (Cayman Islands) Order, 1978. That I had issued an injunction in that regard in January 1990. I cannot think that any of those factors are relevant to the Authority's decision whether to grant an oral hearing to the plaintiffs.

It follows from all of this that I do not find for the plaintiffs on the natural justice issue.

Counsel for the plaintiffs argued very persuasively that the Law does not empower the disclosure of information which came into existence before the date on which the Law became operative. That the Law should not be deemed to have retrospective effect.

The argument went that confidentiality is a right acknowledged by law and, indeed, gives rise to a cause of action if it is breached (see Tournier v National Provincial and Union Bank of England [1924] 1 K.B.461). That confidentiality has particular public significance in the Cayman Islands, so much so that breach of confidentiality may give rise to criminal liability (see the Confidential Relationships (Preservation) Law, as amended).

> "..... there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past."
>
> (see Yew Bon Tew v Kenderann Bas Mara [1983] A.C. 553 at p. 558).

The argument goes on, that the information sought in this request came into existence at a time when obligations and rights existed under civil law and statute and the Law and Treaty should not operate as to interfere with those obligations and rights or, in the words of Yew Bon Tew (supra), impair them.

Section 10 of the Law reads:

> "10. A person who divulges any confidential information or gives any testimony in conformity with a request shall be deemed not to commit any offence under the Confidential Relationships (Preservation) Law, or under any other Law for the time being in force in the Cayman Islands, by reason only of such disclosure or the giving of such testimony; and shall be deemed not to commit any offence under section 10 of the Banks and Trusts Companies Regulation Law (Revised) by reason only of such disclosure or the giving of such testimony; and such disclosure or testimony shall be deemed not to be a breach of any confidential relationship between that person and any other person, and no civil claim or

> action whatsoever shall lie against the person making such disclosure or giving such testimony or against such person's principal or employer by reason of such disclosure or testimony."

Undoubtedly that section may be said to interfere with obligations on the part of a person holding confidential information, but not so as to impose new obligations; rather it removes existing obligations, such as removing the necessity for applying to the Court for permission to divulge the information in testimony. Therefore it does not meet the test of retrospectivity on that head.

Does the Law impair existing rights? The answer must be no. There has never been a right in these Islands to confidentiality in respect of information required in the trial of a serious criminal offence being prosecuted in a domestic or foreign court. Civil liability would not occur if, for example, a banker were to divulge confidential information in testimony to the Court. All the Judges of the Court of Appeal alluded to this in Tournier's case (supra). Bankes LJ., referring to the qualification on the banker's duty of secrecy said, at p. 473:

> "On principle I think that the qualifications can be classified under four heads:
> (a) where disclosure is under compulsion by 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."

Scrutton LJ., (at p.479) said there was no privilege to abstain from answering in a Court of justice questions as to a customer's account, and later (at p.481) said a bank may disclose its customer's accounts and affairs "to prevent frauds or crimes". Atkin LJ., (at p.486) said that the bank has no privilege from disclosure enforced in the course of legal proceedings. So no civil law right exists to keep otherwise confidential information from the courts, domestic (because of the power of summons or subpoena) or foreign (because of the Court's powers to give assistance to a foreign court under the Evidence (Proceedings in Other Jurisdictions)(Cayman Islands)

Order, 1978). As far as I have been made aware the person affected by the disclosure of confidential information has no right to interfere to prevent its disclosure to a domestic Court. He may be granted a hearing in an application under the 1978 Order in respect of a foreign request but he has no right to intervene any more than he has a right to intervene in a Treaty request under the Law.

The provisions of the Confidential Relationships (Preservation) Law, as amended, do not give a vested right to confidentiality to any individual. They may give rise to an expectation by an individual that confidences reposed in his professional advisers will not be divulged, but such an expectation would not be legitimate if such confidences were required to be divulged for the purpose of criminal proceedings. That Law does not affect the civil position as stated in Tournier's case (supra). It creates criminal liability in circumstances where civil liability may already exist. It does not create new rights of confidentiality. Nor does it give a right to a person to prevent disclosure of confidential information to a Court of law if such disclosure may adversely affect him. True it is that if a person is required to testify on confidential information then he must apply to the Grand Court for permission to do so (see section 3A Confidential Relationships (Preservation) Law). That requirement is removed in respect of a Treaty request by section 10 of the Law. But the Grand Court when considering an application under section 3A will not be used as an instrument to withhold confidential information properly and necessarily required by another court, domestic or foreign. The purpose of the procedure is not to protect claims to confidentiality by those indicted for serious criminal offences. That would not be good policy. Indeed a person who would be adversely affected by disclosure it not entitled, as of right, to be heard on an application under section 3A, although he may be brought in to the application. It is as well to note here that the Confidential Relationships (Preservation) Law does not apply to the seeking, divulging or obtaining of confidential information by a police officer of or above the rank of Inspector

July 10th, 1990

"J. Schofield"

Schofield J.

It follows from the above that the plaintiffs fail in their application and I dismiss the suit. Costs are awarded to the defendant.

I am of the view that by precluding civil and criminal liability in respect of confidential information divulged in conformity with a request the Law does not impair a right to confidentiality which exists nor does it impair any procedural right to prevent such confidential information being divulged in a Court of law. The Law and Treaty merely provide another procedure for, inter alia, obtaining evidence where such procedures already exist."

Finally I would add that questions of privilege, as opposed to confidentiality, are protected by Article 8 of the Treaty, as indeed is acknowledged by the United States Authority in the terms of this particular Treaty request.

investigating an offence committed or alleged to have been committed within the jurisdiction or, indeed, outside the jurisdiction if such an officer investigating such an offence is specifically authorised by the Governor (see section 3 (2)(b) of that Law).