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

Cause No: G391/2012

BETWEEN:

1. M.H. INVESTMENTS
2. J.A. INVESTMENTS

APPLICANTS

AND:

THE CAYMAN ISLANDS TAX INFORMATION AUTHORITY (CITIA)

RESPONDENTS

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

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

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

Heard: **29th and 30th August 2013**

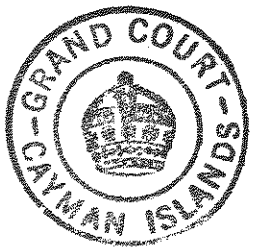
JUDGMENT

INTRODUCTION

1. On the 18th September 2012 the Applicants filed an application for leave to apply for Judicial Review against a decision, of unknown date, of the Cayman Islands Tax Information Authority ("CITIA"), to accede to a Request by the Australian Taxation Office ("ATO") made pursuant to a Tax Information Sharing Agreement[1] ("Tax Information Agreement") entered into between the governments of Australia and the Cayman Islands, that CITIA obtain documents in the Cayman Islands belonging to, and/or containing information relating to, MH Investments and JA Investments Ltd., and thereafter deliver to the ATO the documents obtained for the purposes of judicial proceedings currently before the Australian Courts.

2. The Applicants sought the following relief against the Respondent namely:

i. A declaration that the decision was *ultra vires* of the powers granted to the CITIA by the Tax Information Authority Law (2009 Revision) (the "TIA Law");



ii. An Order for Certiorari that the decision be quashed;

iii. An Order that the CITIA do provide the Applicants with copies of all documents held by it in any way relating to the Request.

3. On the 2nd November 2012 the Applicants were granted leave to apply for Judicial Review outside the three-month period pursuant to GCR O.53 r.4(1) and leave to seek Judicial Review in terms of the aforesaid application was granted.

[1] Long Title: ***Agreement Between the Government of Australia and the Government of the Cayman Islands on The Exchange of Information with Respect to Taxes***.

4. On the 29th and 30th August 2013 the Court heard the application of the Applicants' Amended Notice of Originating Motion seeking relief against the Respondent in relation to the following decisions:

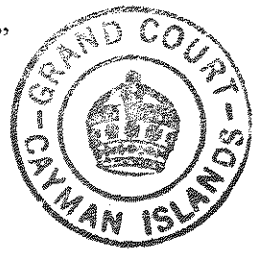
i. The decision of the CITIA made on or about the 23rd of February 2011 to certify and execute a request (the "First Request") by the ATO of same date, purportedly made pursuant to the agreement between the Government of the Cayman Islands and the Government of Australia on the Exchange of Information Agreement dated the 30th March 2010 (the "Tax Information Agreement") that CITIA obtain documents in the Cayman Islands belonging to, and/or containing information relating to the Applicants and thereafter deliver the documents obtained to the ATO.

ii. The decision of the CITIA made on or about the 16th August 2011 to execute a further request (the "Second Request") by the ATO dated the 27th May 2011 and purportedly made pursuant to the Tax Information Agreement, that the CITIA obtain further documents in the Cayman Islands belonging to, and/or containing information relating to the Applicants, and thereafter deliver the further documents obtained to the ATO (the documents so delivered), together with those documents referred to in paragraph (i) above, hereafter referred to collectively as the "Applicants' Documents."

iii. The decision of CITIA, made on or about 21st November 2011, to consent to a 19th October 2011 Request by the ATO (the "Third Request") purportedly made pursuant to the Tax Information Agreement, that the ATO may divulge certain of the Applicants' documents to Her Majesty's Revenue and Customs in the United Kingdom ("HMRC") for the purposes of a request that HMRC do obtain documents from United Kingdom financial institutions and other third parties in the United Kingdom (the "HMRC Request")

iv. The decision of CITIA made on or about the 17th February 2012 to consent to a February 2012 Request by the ATO (the "Fourth Request") stated to be outside the terms of the Tax Information Agreement, that the ATO may divulge the Applicants' documents in court proceedings in Australia which related to taxable periods prior to the 1st July 2010.

Hereafter the Decisions referred to in paragraphs (i), (ii), (iii) and (iv) above are referred to as "the Decisions", the first, second, third and fourth Requests are collectively referred to as "the Requests."



5. Accordingly the Applicants seek the following relief:

a. Declarations to the following effect, namely that:

i. The Decisions were collectively and/or individually *ultra vires* of the powers granted to the CITIA by the Tax Information Authority Law (2009 Revision) ("TIA Law');

ii. CITIA obtained the Applicants' documents unlawfully by procuring the disclosure of the Applicants' documents by the Applicants' registered office provider, FCM Ltd.;

iii. CITIA acted unlawfully in divulging the Applicants' documents to the ATO;

iv. CITIA acted unlawfully in consenting to the divulging of the Applicants' documents by the ATO to HMRC for the purposes of the HMRC request;

v. CITIA acted unlawfully in consenting to the Applicants' documents being divulged in court proceedings in Australia;

vi. The Applicants' documents contained "confidential information" as that term is defined by the Confidential Relationships (Preservation) Law (2009 Revision) ("CRPL") and therefore may not be divulged by the ATO in court proceedings in Australia or otherwise; and

vii. CITIA acted unlawfully in permitting the ATO to use the Applicants' documents for its administration and/or enforcement of taxes in Australia in relation to taxable periods and/or charges to tax arising prior to the 1st July 2010.

viii. An order for Certiorari that the decisions be quashed;

ix. A direction that CITIA shall forthwith write to the ATO;

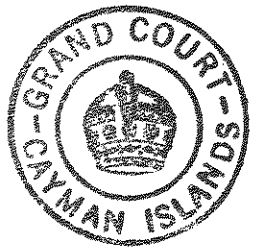
a) formally revoking its consent to the divulging of the Applicants' documents or any part thereof in court proceedings in Australia or otherwise;

b) seeking the ATO's undertaking that it will not divulge the Applicants' documents or any part thereof, in court proceedings in Australia, or otherwise; and

c) demanding the immediate return and/or destruction of all copies of the Applicants' documents;

x. Such further and other relief as this Honourable Court may deem just; and

xi. That the costs of and incidental to this application may be paid by CITIA.



BACKGROUND AND FRAMEWORK OF RELEVANT LEGISLATION

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

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

8. By agreement dated the 30th March 2010 the governments of the Cayman Islands and Australia entered into a Tax Information Agreement.

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

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

11. In order to properly address the submissions of Mr. Lowe Q.C. on behalf of the Applicants and of the Honourable Attorney General on behalf of the Respondent, it is necessary to set out the salient parts of the TIA Law and the Tax Information Agreement.

12. Section 3 of the TIA Law reads:

> *"3.1 This Law shall apply for the purpose of -*
>
> *(a) giving effect to the terms of the scheduled Agreement for the provision of information in taxation matters; and*
>
> *(b) for the purposes of the provision of information in taxation matters on request to a scheduled Country under Part IV.*
>
> *3.2 Nothing in this Law shall require the provision of information under a scheduled Agreement, or under Part IV, in relation to any taxation matter that arose prior to the date of entry into force stipulated in the respective agreement (which is 1st July 2010)....."*

13. The TIA Tax Information Agreements (No.2) Order 2010 was signed by the two Governments on the 30th March 2010.

14. Article 1 of the Tax Information Agreement sets out the object and scope of the Agreement and reads:

> *"The competent authorities of the Contracting Parties shall provide assistance through exchange of information that is foreseeably relevant to the administration of the domestic laws of those Parties, concerning taxes covered by this Agreement. Such information shall include information that is foreseeably relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. Information shall be provided in accordance with the provisions of this Agreement and shall be treated as confidential in the manner provided in Article 8....."*

15. In relation to the question of confidentiality, Article 8 of the Tax Information Agreement reads:

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

16. Article 12 of the Tax Information Agreement sets out when it comes into force and reads:

> *"The Contracting Parties (namely the Cayman Islands and Australia) shall notify each other in writing through the appropriate channel of the completion of the constitutional legal procedures for the entry into force of this Agreement. This Agreement shall enter into force on the date of the last notification and shall thereupon have effect:*
>
> a) *for criminal tax matters from 1st July 2010; and*
>
> b) *for all other matters covered in Article 1 from 1 July 2010, but only in respect of taxable periods beginning on or after that date or, where there is no taxable period, all charges to tax arising on or after that date."*

17. Article 5 deals with the exchange of information upon request under the Tax Information Agreement between the Cayman Islands and Australia. Section 5 of Article 5 reads:

> *"The competent authority of the Applicant Party shall provide the following information to the competent authority of the Requested Party when making a request for information under this Agreement to demonstrate the foreseeable relevance of the information to the request:*

(a) the identity of the person under examination or investigation;

(b) a statement of the information sought including its nature and the form in which the applicant wishes to receive the information from the Requested Party;

(c) the tax purpose for which the information is sought;

(d) the grounds for believing that the information requested is held in the Requested Party or is in the possession or control of a person within the jurisdiction of the Requested Party;

(e) to the extent known, the name and address of any person believed to be in possession of the requested information;

(f) a statement that the request is in conformity with the law and administrative practices of the Applicant Party, that if the requested information was within the jurisdiction of the Applicant Party then the competent authority of the Applicant Party would be able to obtain the information under the laws of the Applicant Party under the normal course of administrative practice, and that the information requested is in conformity with this Agreement; and

(g) *a statement that the Applicant Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.*"

18. Part III of the TIA Law focuses on the Respondent's role in relation to the execution of requests and s.7(1) reads:

> "*Upon receipt of a request, and subject to s.6(2) and s.17(1), the Authority shall determine whether a request is in compliance with the relevant scheduled Agreement or Part IV, as the case may be, and, if it is determined that there is compliance, the Authority shall execute the request in accordance with, but subject to, the provisions of the relevant scheduled Agreement or Part IV as the case may be, and this Law.*"

Before deciding to execute a Request from a Contracting Party, the Authority may seek further information and s.7(2) of the TIA Law reads:

> "*The Authority may request such additional information from the requesting Party as may be necessary to assist the Authority in executing the request.*"

19. Section 8(4) of the TIA Law follows on from s.7 and deals with the Authority's recourse to the Court to compel witnesses and for the production of evidence and reads:

> *"Where, under a request, the Authority considers it necessary to obtain specified information or information of a specified description from any person the Authority shall –*
>
> *(a) in the case of information required for proceedings in the territory of the Requesting Party or related investigations, apply to a judge for an order to produce such information; or*
>
> *(b) in the case other than that referred to in paragraph (a), issue a notice in writing requiring the production of such information as may be specified in the notice; and such notice may require the information –*
>
> *i. to be provided within a specified time;*
>
> *ii. to be provided in such form as the Authority may require; and*
>
> iii. *to be verified or authenticated in such manner as the Authority may require.*"

20. Section 17(1) of the TIA Law provides for giving notification of the existence of a Request to a subject of a Request and reads:

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

21. Section 21 of the TIA Law deals with the restriction on the use of information and reads:

> *"21. (1) The requesting Party shall not, without the prior written consent of the Authority, transmit or use information or evidence provided under this Law for purposes, investigations or proceedings other than those stated in the request.*
>
> *(2) Before the Authority gives consent under subsection (1) in relation to testimony provided or an order issued under section 8, the Authority shall apply to a Judge for directions."*

22. The Applicants' application for Judicial Review of the four Decisions made by the Respondent is grounded by four affidavits of Mr. John Hyde Page ("Mr. Page") sworn on the 18th September 2012, 24th January 2013, 26th April 2013 and 29th July 2013, the affidavit of Juliet Lucy ("Ms. Lucy") sworn on the 25th October 2012; the affidavit of Sytara Anekamai sworn on the 26th July 2013; the affidavit of Mr. Vanda Gould ("Mr. Gould") sworn on the 29th July 2013, and the affidavit of Mr. John Scott Leaver ("Mr. Leaver") also sworn on the 29th July 2013.

23. The Respondent's Opposition to the application for Judicial Review is supported by the affidavits of Mr. Duncan Nicol ("Mr. Nicol") the director of the CITIA sworn on the 16th January 2013; Mr. Paul William Cheetham ("Mr. Cheetham") sworn on the 5th April 2013; Mr. Aris Zafiriou ("Mr. Zafiriou") sworn on the 10th May 2013; and of Mrs. Marlene Carter ("Mrs. Carter") the deputy director of the CITIA, sworn on the 21st June 2013, 15th July 2013 and the 29th August 2013.

24. I am grateful to leading counsel, Mr. Lowe, Q.C., and Mr. Dawson, on behalf of the Applicants, and to the Attorney General, Honourable Samuel Bulgin Q.C. and Crown Counsel Ms. Dawn Lewis, acting on behalf of the Respondent for their helpful and well-reasoned written and oral submissions.

CHRONOLOGY OF EVENTS IN AUSTRALIA AND THE CAYMAN ISLANDS

25. I have endeavoured to set out a chronology of events in Australia and in the Cayman Islands from the aforesaid affidavit evidence and from the helpful chronology contained in the written submissions presented by the Attorney General.

26. In 2004 "Project Wickenby" was established in the jurisdiction of the Requesting Party to investigate tax avoidance or evasion and, in some cases, large-scale money laundering. Mr. Zafiriou, who has been employed by the ATO since December 1978 is Director of Project Wickenby and, Mr. Cheetham is Assistant Commissioner of Project Wickenby. In September 2009 the ATO commenced "Operation Rubix" which Mr. Zafiriou deposes aimed to address tax schemes facilitated by Mr. Gould and Gould Ralph PTY Ltd.

27. Mr. Zafiriou confirms that Operation Rubix set out to conduct audits and reviewed the affairs of Mr. Gould, Mr. Leaver and their associate entities. Mr. Zafiriou identifies the entities in his affidavit, which are as follows:

a. Hua Wang Bank Berhad ("Hua Wang Bank") a licensed bank under the International Banking Act of Samoa.

b. Chemical Trustee Limited ("Chemical Trustee") a company incorporated in the United Kingdom.

c. Bywater Investments Limited ("Bywater") a company incorporated in the Bahamas[2].

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[2] Formerly the third Applicant.

d. Derrin Brothers Properties Limited ("Derrin Brothers"), a company incorporated in the United Kingdom.

e. Southgate Investment Funds Limited ("Southgate")

Mr. Zafiriou refers to these entities as the "Taxpayers". The managing director of Chemical Trustee, Derrin Brothers and Bywater, is Mr. Peter Borgas ("Mr. Borgas") who lives in Switzerland. Mr. Borgas is a director of both Applicants in these proceedings.

28. In his First Affidavit Mr. Page deposes to the fact that the Taxpayers – Hua Wang Bank, Chemical Trustee, Bywater and Derrin Brothers are subsidiary entities of the Applicants and, further, that these four taxpayers are owned by the Applicants either directly or through interposed companies.

29. On the 12th August 2010 the Australian Commissioner of Taxation ("The Commissioner") issued Notices of Assessment to the Taxpayers for the years of income from the 30th June 2000 to the 30th June 2007 in respect of Australian sourced income from share trading activities. Operation Rubix had conducted audits and it was determined that the four Taxpayers had generated income and profits from trading in Australian shares.

30. Also on the 12th August 2010 the Deputy Commissioner of Taxation ("the Deputy Commissioner") commenced Recovery Proceedings against the Taxpayers in the Federal Court of Australia, seeking judgment against the Taxpayers in respect of the unpaid tax liabilities identified in the Assessments. These have been described as the "Recovery Proceedings."

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31. Also on the 12th August 2010 the Deputy Commissioner commenced ancillary proceedings to the Recovery Proceedings, seeking freezing orders over the Taxpayers' Australian assets. On the 12th August 2010 Justice Jessop in the Federal Court of Australia (VID672/2010) granted freezing Orders in relation to the four Taxpayers – Hua Wang Bank, Derrin Brothers, Chemical Trustee and Bywater.

32. Mr. Zafiriou confirms that when the Recovery Proceedings first commenced they were identified solely as VID 672/2010, but were subsequently split into three separate proceedings, namely, VID 672/2010 in respect of Hua Wang Bank; VID 887/2010 in respect of Chemical Trustee, Bywater and Derrin Brothers and VID 888/10 in respect of Southgate.

33. On the 13th September 2010 the four Taxpayers – Hua Bank, Chemical Trustee, Derrin Brothers and Bywater – lodged Objections to the Assessments pursuant to Part IVC of the Taxation Administration Act 1953 ("Part IVC").

34. On the 28th November 2010, Justice Kenny, of the Federal Court of Australia granted judgment to the Deputy Commissioner in respect of the Recovery Proceedings for the unpaid taxation liabilities against the four Taxpayers. In addition, Justice Kenny set out the procedure for Notices of Assessments, Objections, Review, and Appeals, pursuant to Part IVC.

35. On the 23rd February 2011 the ATO sent its first Request to the Respondent pursuant to Article 5 of the Tax Information Agreement.

36. On the 28th March 2011 the Respondent received the first Request from the ATO.

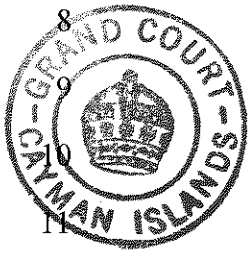
37. On the 30th March 2011 the ATO issued reasons for its decision in respect of the objections.

38. On the 14th April 2011 the Respondent served a Notice to Produce Information on FCM Ltd. ("FCM") pursuant to s.8(4)(b) of the TIA Law.

39. On the 4th May 2011 FCM provided the information pursuant to the Notice to Produce.

40. On the 5th May 2011 the Respondent transmitted the information relating to the Applicants to the Requesting Party – the ATO.

41. On the 16th May 2011 the four Taxpayers commenced proceedings in the Federal Court of Australia appealing the Objection Decisions in respect of the tax liabilities pursuant to Part IVC. These proceedings are numbered NSD 652/11 – Bywater; NSD 653/11 – Hua Wang Bank; NSD 654/11 – Chemical Trustee; NSD 656/11 – Derrin Brothers.



42. Also on the 16th May 2011 the Taxpayers commenced proceedings in the Administrative Appeals Tribunal seeking a review of the Objection Decision in respect of Assessment for administrative penalties, and one of the Assessments issued to Chemical Trustee.

43. On the 27th May 2011 the ATO sent a second Request to the Respondent.

44. On the 16th June 2011 the ATO filed appeal statements in the Part IVC proceedings.

45. On the 20th July 2011 the Respondent received the second Request dated the 27th May 2011 from the ATO.

46. On the 16th August 2011 the Respondent served two Notices to Produce on FCM.

47. On the 20th September 2011 the Respondent sent the information to the ATO pursuant to the second Request.

48. On the 19th October 2011 the ATO sent its third Request, this time, seeking the Respondent's permission to disclose documents, obtained from FCM relating to the Applicants, to HMRC in the United Kingdom.

49. On the 21st November 2011 the Respondent answers the third Request and consents to ATO disclosing the said documents to HMRC.

50. On the 13th February 2012, the ATO issued a fourth Request to the Respondent seeking its consent to use documents obtained from FCM relating to the Applicants in the Part IVC proceedings before the Federal Court of Australia.

51. On the 7th June 2012 the four Taxpayers filed an Originating Summons with the Federal Court for an Order for Preliminary Discovery against the Commissioner for all Requests made by the Commissioner to foreign revenue authorities.

52. On or about the 20th June 2012 the Australian attorneys, Henry Davis York, acting for the four Taxpayers, were served with an affidavit prepared by Mr. Malcolm McKay ("Mr. McKay") an officer of the ATO, which exhibited a large number of documents relating to the Applicants in all four of the Part IVC appeals NSD 652, 653, 654, 656 of 2011.

53. On the 30th July 2012 Solomon Harris, the attorneys acting for the Applicants, wrote to Mr. Nicol on behalf of the Respondent asking for information relating to a Request from the ATO and a copy of the Request. Messrs. Solomon Harris set out the documents belonging to the Applicants which the ATO was proposing to use in Australian proceedings. The Applicants' attorneys submitted that the Request from

the ATO was invalid. The Applicants' attorneys asked the Respondent to provide a copy of the Request, and asked to know the basis upon which the information was forwarded to the ATO.

54. On the 10th August 2012 Mr. Nicol replied to the Applicants' Cayman attorneys, explaining that, pursuant to Article 8 of the Tax Information Agreement all information was confidential. The Respondent confirmed that the Request was in proper form and was certified by the ATO as being in compliance with the Agreement, including all the requirements of Article 5. The Respondent refused to provide a copy of the Request and also did not provide the basis upon which the information was forwarded to ATO.

55. On the 5th September 2012 the Cayman attorneys for the Applicants wrote to Mr. Nicol asking him to reconsider his decision in relation to the Request – submitting that the (original) Request was invalid and further, asking the Respondent to confirm to which tax years the Request from the ATO related.

56. On the 13th September 2012 Mr. Nicol wrote back to the Applicants' attorneys declining to provide a copy of the Request or the information on the basis, amongst other things, of the Respondent's confidentiality obligations and confirming again that the Request from the ATO is in compliance with Article 5 of the Tax Information Agreement.

57. On the 17th September 2012 the Federal Court of Australia dismissed the application brought by the four Taxpayers for Preliminary Discovery of the ATO's Requests to foreign jurisdictions.

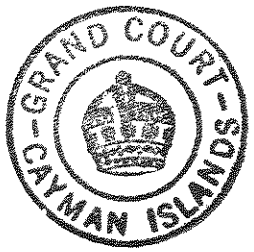
58. On the 18th September 2012 the Applicants applied for leave to apply for Judicial Review in these proceedings.

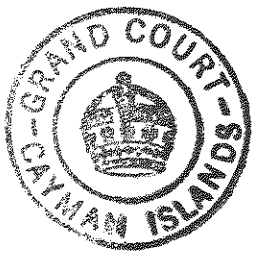
59. On the 2nd November 2012 this Court granted the Applicants leave to apply for Judicial Review outside of the three-month period pursuant to GCR O.53 r.4(1).

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

61. On the 24th January 2013 there was a contested hearing between the parties as to whether the Court should order discovery to the Respondent of the Request dated the 23rd February 2011 from the ATO.

62. On the 28th February 2013 I delivered my Ruling and ordered the disclosure to the Applicants of the first Request, the second Request dated the 27th May 2011, and, the documents referred to in Mr. Nicol's affidavit sworn on the 10th January 2013.





POSITION OF THE APPLICANTS

UNDUE DELAY

63. The Applicants' position is that reasons were given for the delay when they applied for leave to apply for Judicial Review. The reasons included the misguided refusal of the Respondent to produce the Requests or comply with its obligations of candour. The Applicants submit that they wanted to know the true factual position before embarking on judicial review proceedings against the CITIA.

64. Furthermore, the Applicants submit that it is no longer open to the Attorney General to argue that the Applicants did not have perfectly valid reasons for their extension of time application. Further, the Applicants contend that the question of undue delay is now closed and not open for review.

65. The Applicants accept that the Court can consider the question of substantial hardship, prejudice by detriment to good administration as a result of delay, and submit that there is no evidence that there is any prejudice to any other party, or is there any evidence that it would be detrimental to good administration.

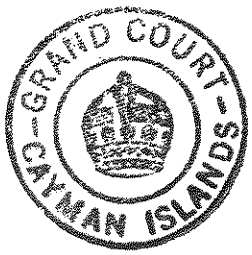
66. Leading counsel on behalf of the Applicants submits that any allegation of delay must be viewed with caution because there is a greater interest in seeing unlawful decisions exposed. Mr. Lowe submits that the principle of legality means that the discretion to refuse a remedy is a very narrow one. The Applicants rely on Lord Bingham's dicta in ***Berkeley v. Secretary of State for Environment*** (2001) 2 A.C. 603 at 608 where he said:

> *"Even in the purely domestic context, the discretion of the court to do other than quash the relevant order or action where each excessive exercise of power is shown is very narrow."*

Mr. Lowe Q.C. also relies on the dicta of Lord Hoffman at page 616 where he said:

> *"It is exceptional even in domestic law for a Court to exercise its discretion not to quash a decision which is found to be ultra vires."*

67. The Applicants complain that the Respondent did not fully understand its responsibilities and behaved in a highhanded and dismissive fashion. Furthermore, the Applicants complain that the ATO has been less than straightforward and has misused the information provided by the Respondent.



MATERIAL NON-DISCLOSURE

68. The Applicants complain that this is the first time that this allegation by the Respondent has been made. It is the Applicants' position that this has never been foreshadowed in correspondence or in evidence, and the Applicants submit it is utterly specious.

69. Leading counsel accepts that the Applicants have a duty of full and frank disclosure when leave is sought because leave is sought *ex parte*. However, it is the Applicants' position that once proceedings are *inter partes*, the Applicants no longer have this duty and, in fact, it is the Respondent who then has a duty of candour. Accordingly, the Applicants submit that there has been no material non-disclosure on their part.

ABUSE OF PROCESS

70. Mr. Lowe Q.C. submits that it is surprising for the Attorney to press the submission that a judicial review in Australia of a request by the ATO (which is premised on the misuse of its own powers under the Australian legislation), renders a judicial review in the Cayman Islands of actions by the Respondent (which have to be understood by reference to the statutes of the Cayman Islands) an abuse of process.

71. In Australia, the Judicial Review proceedings were brought by the Taxpayers challenging the Request the ATO made of the UK HMRC. In the Cayman Islands, the Applicants seek Judicial Review of the exercise by the Respondent of its powers conferred by the TIA Law.

72. In any event, the Applicant submits that there is ordinarily no abuse of process in bringing two parallel proceedings in different jurisdictions. The Applicants rely upon the Privy Council decision ***Société Générale v. Lee Kui Jak*** (1987) A.C. 871 that there is:

> *"...no presumption at parallel proceedings in different jurisdictions between the same parties (which these are not) involving the same claims (which these are not) are abusive....."*

73. On this point the Applicants contend that their complaint could not be brought in any other jurisdiction and further, the Respondent would not be amenable to any judicial review application in Australia, just as the ATO is not amenable to any judicial review in the Cayman Islands.

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74. The Applicants also take issue with the criticism by the Attorney that the Applicants misled the Court by referring to the Recovery Proceedings, when those proceedings had in fact concluded prior to Mr. Page's first affidavit being used in these proceedings. In fact, Mr. Lowe refers to the Attorney General's submission that, at the time when the first Request was made, there were no proceedings.

75. Mr. Lowe asks the Court to remind itself that at the time when leave was being sought, the Respondent had refused to give any disclosure of the Request from the ATO or the Respondent's response. All that the Applicants knew was that an affidavit – the McKay affidavit – had been filed in Australian proceedings in June 2012. Accordingly, the Applicants say that it was perfectly reasonable for them to infer at the time of the leave application that the Respondent had produced information to the ATO and agreed to it being used in Australian proceedings.

76. The Applicants submit that they described the litigation in Australia as "Australian Tax Proceedings" and did not distinguish between recovery proceedings and Part IVC appeals – which the Applicants suggest is not unlike the way in which Justice Perram described the litigation at paragraph 4 in ***Hua Wang Bank v. Commissioner of Taxation*** (2012) FCA 928.

77. The Applicants now submit that it was obvious that there would be different components to the Australian tax proceedings. There are Recovery Proceedings, Part IVC appeals, and the Judicial Review proceedings – all relating to the same assessments for the same years and for the same Taxpayers. Furthermore, the technical distinction between these different sets of proceedings has no relevance to the claim before this Court, as the Respondent and the Attorney General refused to disclose anything about the Requests.

78. The Applicants contend that for the aforesaid reasons, there has been no abuse of process on their part.

79. The Applicants urge the Court to accept that the Bill of Rights, Freedoms and Responsibilities (the "Bill of Rights") which came into force in early November 2012 pursuant to the Cayman Islands Constitution Order of 2009, has enhanced the role of the Grand Court in protecting rights and submits that it could change Judicial Review fundamentally, in the same manner as the Human Rights Act 1998 did in England and Wales. Consequently, Mr. Lowe Q.C., submits that when fundamental Human Rights are engaged, the Courts should always apply a more anxious level of scrutiny and a standard of review which is especially rigorous. Accordingly, the Applicants contend that under these principles, the Respondent must demonstrate proper justification and high standards of fairness in the decision it makes.

80. The Applicants put their case regarding their rights of privacy and confidentiality on three separate grounds.

81. *Ground 1*: The Applicants state that the information that the Respondent obtained from FCM would normally be protected at common law and by virtue of the CRPL.

Though the Applicants accept that under the Tax Information Agreement with Australia the provisions of the CRPL do not apply, Articles 1 and 8 of the 16th Schedule ensure that the Requesting Party that receives the information must maintain its confidentiality.

82. *Ground 2:* The Applicants rely on Article 9 of the Bill of Rights which reads:

> *"9. (1) Government shall respect every person's private and family life, his or her home and his or her correspondence.*
>
> *(2) Except with his or her own consent or as permitted under subsection (3), no person shall be subjected to the search of his or her person or his or her property or the entry of persons on his or her premises.*
>
> *(3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society (a) in the interests of defence, public safety, public order, public morality, public health, town and country planning, or the development or utilization of any other property in such a manner as to promote the public benefit."*

The Applicants contend that although the TIA Law requires disclosure in the interests of promoting public benefit or public order, it does not mean that the Respondent is entitled to a liberal construction of the legislation or that the Respondent is absolved from meeting heightened standards.

83. *Ground 3*: The Applicants rely on Article 7 of the Bill of Rights which states:

> *"Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time."*

Accordingly, the Applicants contend that before the Respondent determined that their rights of privacy and confidentiality could be invaded, it was appropriate for him to ensure that they had a fair hearing before a Judge of the Grand Court.

84. The Applicants challenge the four decisions made by the Respondent to comply with the ATO's requests on the following grounds:

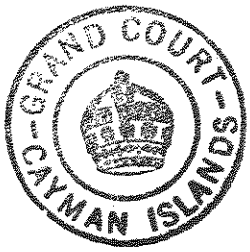
a. The CITIA had no statutory authority to execute Requests as they related to tax years outside the scope of Schedule 16 and s.3(2) and (4) of the TIA Law;

b. The CITIA unreasonably failed to carry out adequate enquiries as to whether it had the power to comply with the Requests and, if so, whether it was appropriate to do so;

c. Alternatively, the CITIA made a fundamental error as to the ATO's rights under the TIA Law or the Tax Information Agreement to request the information sought;

d. The CITIA failed to ensure that the Applicants were served with a Notice under s.17 of TIA Law and did not make any application to a Judge under s.8(4)(a) or s.21(2) when it should have done;

e. By compelling the production of confidential information without lawful authority under TIA Law and the Tax Information Agreement, the Respondent procured contraventions of the CRPL, unjustified invasions of privacy and deprived the Plaintiffs of their rights to a fair hearing.



DUTY OF ENQUIRY

REQUESTS SOUGHT IN RELATION TO TAX YEARS PRIOR TO 1ST JULY 2010

85. The Applicants submit that under the principles set out in the TIA Law the Respondent should not have ordered the production of information in relation to taxes for the years prior to the 1st July 2010 and, therefore, acted in contravention of the TIA Law as read with the Tax Information Treaty.

86. The Applicants contend that all four Requests related in part or in whole to the enforcement of liabilities for tax years prior to July 2010. Mr. Lowe Q.C. argues that it can now be seen, given what is known about the Assessments and the Part IVC appeals, that the purpose of the Requests objectively determined on the balance of probabilities was to assist in collecting tax for years prior to the 1st July 2010.

87. The Applicants submit that at the time of both the first and the second Requests a 12-month tax year had not yet expired and, accordingly, the Applicants submit that the reference to a "real time" investigation into the tax year ending the 30th June 2011 is disingenuous. The Applicants submit that the earliest tax year would be on the 30th June 2011 and they submit further that on the evidence of Mr. Page, there is no known concept of "real time" tax review.

88. In addition to the fact that 12 months had not elapsed from the 1st July 2010, the Applicants contend, on the basis of the evidence before this Court, that no Assessments have ever been raised against Mr. Leaver or Mr. Gould for the period 2010-2013.

89. ***In relation to the first Request*** made on the 23rd February 2011, the Applicants contend that the first tax year covered by the Tax Information Agreement would not end until the 30th June 2011. Accordingly they submit that it is inherently improbable that a Request of this nature would be made for a tax year that has not yet expired.

Moreover, the Applicants complain that the first Request made it plain that "*the tax purpose for which the information is sought – the active investigation of Mr. Gould and Mr. Leaver – is over a number of years to the present.*" Mr. Lowe contends that this is a "red flag" that should have alerted the Respondent to make an enquiry as to whether the ATO was seeking information in relation to taxable periods before the 1st July 2010 and, therefore, outside of the ambit of the treaty. Accordingly Mr. Lowe submits that the Respondent should have made an enquiry of ATO as to the years for which the ATO was seeking information and, further, should have sought an assurance from the ATO that the information would not be used to establish liability for tax years commencing before the 1st July 2010.

90. ***The second Request*** dated the 27th May 2011 was again, the Applicants contend, before the expiry of the first taxable 12-month period after the 1st July 2010. The Applicants complain about the ambiguous wording which, they say, was designed to imply that the ATO did not need the information for periods commencing prior to 1st July 2010:

> "*Although the information Request relates to a period prior to 1st July 2010, the historical information is necessary to determine the true beneficial ownership of JA Investments for taxation matters arising after 1 July 2010.*"

Mr. Lowe contends that this is at best, ambiguous. He submits that, literally speaking, this does not mean that the information would only be used for tax periods after 1st July 2010.

The Applicants contend that the Respondent complied with this Request without seeking any assurance from the ATO that the provision of information would not be used to establish liability for tax years commencing before 1st July 2010.

91. ***The third Request***, dated the 13th October 2011 was for the use of information provided under the first and second Requests, in proceedings in the United Kingdom.

The Applicants contend that these UK proceedings were not identified in the first or second Requests. Accordingly, the ATO realised that they needed the consent of the Respondent under s.21(1) of the TIA Law. The Applicants contend that the Respondent should have applied to the Court for directions under s.21(2) of the TIA Law and its failure to do so makes the Respondent's provision of this information pursuant to the third Request, *ultra vires*.

The Applicants complain that the ATO has been less than frank, as previously the ATO suggested that it was only asking for information to prove liabilities for years commencing after 1st July 2010. However, as a result of the contents of the third Request the ATO now makes it clear that it was using the information for pre-2010 tax investigations.

Again, the Applicants complain that the Respondent failed to make any enquiry, and complied with the third Request in breach of an express statutory provision. Furthermore, it is the Applicant's contention that the ATO's subsequent use of the information in the United Kingdom was a contravention of Articles 1 and 8 of the Tax Information Agreement and s.21(1) of the TIA Law, because the Respondent had not given a lawful consent.

92. ***The fourth Request*** is the decision by the Respondent, made on or about the 17th February 2012, to consent to the fourth Request, dated the 13th February 2012, which the Applicants submit, was unlawful, as it provided the consent for the ATO to divulge documents belonging to the Applicants in Court proceedings in Australia, relating to taxable periods prior to the 1st July 2010. Furthermore, the Applicants contend that the ATO clearly knew it was inviting the Respondent to provide assistance which it had no power to give – because it related to the assessments for tax years prior to 2010. By virtue of the fact that the ATO expressly acknowledged that the fourth Request was outside the TIA Law and Tax Information Agreement, it follows that the ATO could not be absolved from its duty to maintain confidentiality by the Respondents' *ultra vires* consent. Accordingly, the Applicants contend that the ATO's subsequent use of the information was in contravention of s.21(1) of the TIA Law, and Articles 1 and 8 of the Tax Information Agreement.

The Applicants claim that as a result of what is contained in the second, third and fourth Requests, it is clear that the Respondent was misled by dissembling statements from the ATO in the case of the first and the second Requests.

OBLIGATION TO MAKE AN APPLICATION TO A GRAND COURT JUDGE

93. The Applicants contend that if the Respondent had understood its duty under ***Tameside***[3] it would have enquired as to the years for which the ATO was seeking information, and further, whether there were proceedings or any contemplated proceedings, or related investigations.

94. The Applicants maintain that there was an obligation on the Respondent to bring the matter before a Judge, and this is an essential safeguard for their rights of privacy and confidentiality. Mr. Lowe makes the point that the Respondent and those representing the ATO have presented a great deal of evidence to demonstrate that the Recovery Proceedings were concluded and also to support the Applicants' position that the information sought in the Requests could not be required for "*proceedings in the territory of the requesting party or related investigations.*"

95. The Applicants make the point that the statutory process for challenging Assessments was already underway, and that the ATO knew proceedings would inevitably follow.

96. In relation to the second Request, Part IVC appeals had already been commenced by the four Taxpayers, and, accordingly, the Respondent's decision not to apply to the Grand Court pursuant to s.8(4)(a) of the TIA Law was unlawful.

97. The third Request dated the 13th October 2011, related to proceedings in the UK and the fourth Request related specifically to current Part IVC appeals. Accordingly, the Respondent had a duty to apply to the Court for directions under s.21(2) of the TIA Law. The Respondent was, therefore, in breach of the said duty.

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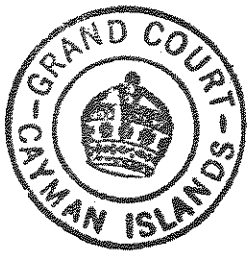
[3] ***Secretary of State for Education and Science v. Tameside Metropolitan B.C.*** [1977] A.C. 1014

98. The Applicants contend that the Respondent unreasonably failed to comply with its ***Tameside*** duty, to inform itself of the relevant facts before making any determination under the TIA Law. Alternatively, the Respondent acted upon a mistake of such an important fact as to give rise to unfairness.



SECTION 17 NOTICE

99. It is the position of the Applicants that they were entities who were the subjects of all four Requests from the ATO and clearly the information was not required for a criminal matter. The Applicants maintain that s.17(1) of the TIA Law required the Respondent to serve a Notice on the Applicants, advising them of the existence of the Requests, and giving certain other particulars of the Request. The Applicants submit that the s.17 Notice triggered the right of the Applicants to write to the Respondent within fifteen days with their written submissions. The Applicants submit that the prominence accorded to the notification right under s17(1) is plain from the fact that the Respondent's powers are expressly made subject to s.17(1) in s.7(1). Accordingly, the Applicants submit that, in the present case it cannot be disputed that no notice was served on the Applicants. Had the Respondent complied with its duty to serve the notification, the Applicants would have been able to argue that CITIA should not comply with the Requests – given the tax years to which they were directed.

POSITION OF THE RESPONDENT

DELAY

100. The Honourable Attorney General, Mr. Bulgin, Q.C., submits that the Applicants' application for leave pursuant to GCR O.53 r.4(1) was not made promptly and in any event not within three months.

101. Furthermore the Respondent relies upon s.31(6) of the Senior Courts Act 1981 (UK) which applies in the Cayman Islands by virtue of s.11 of the Grand Court Law (2008 Revision) and reads as follows:

> "*Where the High Court considers that there has been undue delay in making an application for judicial review, the Court may refuse to grant –*
>
> *(a) Leave for making of the application; or*
>
> *(b) Any relief sought in the application*
>
> *If it considers that the grant of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of any person or would be detrimental to good administration.*"

102. The Attorney submits that at the hearing of the application for substantial relief, it is open to the Court to examine whether or not the application for leave was made promptly and if not, whether there are good reasons for delay, and even if there is a good reason, whether to grant the relief sought or not.

103. The Respondent accepts that the Applicants only became aware of the fact that the ATO possessed information belonging to the Applicants on or about the 20th June 2012, when the McKay affidavit exhibiting documents belonging to the Applicants was filed in the Part IVC Australian proceedings. However, the Attorney makes the point that the Applicants appeared to have done nothing for 40 days before their attorneys wrote to the Respondent on the 30th July 2012.

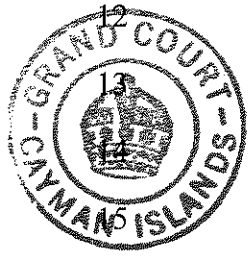
104. Furthermore the Attorney argues that the Applicants must have concluded that they had grounds for judicial review and, accordingly, there was undue delay from the 30th July 2012 until the 18th September 2012.

105. The Attorney also submits that the Applicants waited until the Federal Court in Australia had dismissed an application for judicial review in discovery proceedings filed on the 6th June 2012 by Bywater and other taxpaying entities, and therefore this delay was calculated, tactical manoeuvring. The Attorney makes the point that the real purpose for the application in the Cayman Islands was to get discovery of the Request which the Applicants were denied in Australia and, accordingly, this borders on an abuse of the process of this Court.

MATERIAL NON-DISCLOSURE

106. The Respondent complains that the Applicants have failed in their duty to make full and frank disclosure of material facts. The Honourable Attorney refers to the First Affidavit of Mr. Page at paragraph 17 where Mr. Page deposed to the fact that the ATO was seeking to execute Judgment Debt in the Recovery Proceedings, and, further, that the Recovery proceedings commenced in 2010. The Attorney submits that the combined effect of this information gives the reasonable impression that the present proceedings started in August 2010.

107. The Attorney submits that the question of when proceedings commenced is germane to the issue of whether the information was sought for proceedings, and complains that the Applicants never revealed the fact that the Recovery Proceedings concluded on the 25th November 2010. Furthermore, the Respondent complains that the Applicants did not reveal that the application for a freezing order had been granted to the Commissioner of Taxation. Accordingly, the Attorney submits that, contrary to the impression created by Mr. Page's evidence, the ATO was seeking to execute judgment debts against the taxpayers, whereas the ATO had already frozen the assets of the taxpayers.



108. The Attorney relies upon the evidence of Mr. Zafiriou who states that the Recovery Proceedings concluded on the 25th September 2010. The Attorney's complaint is that the first Request was sent on the 23rd February 2011 – after the Recovery Proceedings were concluded and before the Part IVC appeals were filed on the 16th May 2011. Therefore the Respondent submits that there were no relevant proceedings at the time the ATO sent the first Request.

109. The Attorney also complains that the Applicants did not disclose that the judicial review and discovery proceedings in Australia were dismissed on the 17th September 2012 – one day before the Applicants applied for judicial review in Cayman. The Respondent's position is that the object of the proceedings was to quash all requests for information made by the ATO and to disgorge copies of the Request made by ATO to the Respondent.

110. Accordingly, the Attorney submits that the failure by the Applicants to disclose to the Respondent that the Recovery Proceedings were concluded and, that the Taxpayers had failed in their attempts to get copies of any Requests, would have been germane issues in deciding whether leave to apply for judicial review in the Cayman Islands should have been granted. The Attorney submits that this argument is fortified by the background of delay on the part of the Applicants.

111. Accordingly, the Attorney submits that these failures on the part of the Applicants have resulted in a breach of their duty of candour to the Court.

ABUSE OF PROCESS

112. The Respondent submits that Bywater, which is owned by the Applicants and was formerly the third Applicant in these proceedings, and the other Taxpayers, had instituted proceedings for Judicial Review in Australia, and also for Preliminary Discovery of all Requests for tax information made by the ATO to Revenue Authorities in other jurisdictions. The Respondent claims that the object of the proceedings brought by Bywater and the Taxpayers included the quashing of all Requests for information made by the ATO. The application for judicial review and Preliminary Discovery was dismissed on the 17th September 2012 pursuant to a judgment for Justice Perram of the 31st August 2012.

113. The Attorney submits that these proceedings before this Court are an abuse of process, and relies upon O.18 r.19/18 of the ***English Supreme Court Practice*** 1999 where it states:

> "*The Court will prevent the improper use of its machinery and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation.*"

Furthermore, the Attorney relies on the ***Fourth Edition Halsbury's Laws of England*** Vol 37 paragraph 446 where the learned editors state:

> "*If there are two Courts faced with substantially the same question or issue, that question or issue should be determined in only one of those Courts and the Court will, if necessary stay one of the actions.*"

Accordingly, the Attorney submits that, in the ordinary course, the Courts will prevent one of the two Courts from dealing with the same subject matter.

114. The Respondent relies upon the fact that Perram J. in his judgment dated the 30th August 2012 found at paragraph 36:

> *"In those circumstances, I conclude that it is not shown that the Commissioner's request (to the HMRC) is predominantly for the purpose of the Part IVC proceedings. I am satisfied neither as to the taxpayers' arguments, based on timing or their submissions about the overlap."*

Perram J. went on to state at paragraph 50:

> *"These observations are fatal to the taxpayers' claim...[and further] indeed my rejection of the Judicial Review Application means I can see no reason for an argument that the Commissioner had engaged in a contempt by making the request of the UK."*

115. The Attorney submits that notwithstanding the fact that the Applicants were not expressly named parties in the Australian proceedings, and notwithstanding that the instant proceedings are a challenge to the Decisions of the Respondent, the present proceedings constitute an abuse of process.

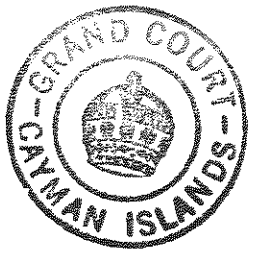
116. The Attorney relies upon the case of ***Parakou Shipping Pte Ltd. v. Jinhui Shipping and Transportation Limited*** [2011] 2 HKLRD 1 for the proposition that, even where the parties are different, and where the proceedings take place in different jurisdictions, the claim can be struck out as an abuse of process, where there are similarities in the issues raised and where the parties are alter egos. Accordingly, the Attorney submits that the Judicial Review and Preliminary Discovery applications before the Federal Court of Australia, and the instant proceedings before this Court, were instituted with the objective of obtaining copies of any Requests and a finding from the respective Courts that the information that the ATO was seeking to obtain from various foreign countries was for the purpose of the Part IVC Proceedings. Consequently the Attorney submits that the ultimate goal

of the Applicants is to exclude from the Part IVC proceedings evidence which the ATO may have obtained from foreign jurisdictions, including the Cayman Islands. Accordingly, the Honourable Attorney General submits that it is manifestly obvious that the instant proceedings are a "*tactical move on the part of the Applicants to achieve, in the Cayman Islands, what their privies could not achieve in Australia.*"

117. The Attorney says that this submission is even made clearer by the letter of Henry Davis York – attorneys for the Applicants to counsel for the Commissioner of Taxation – which states:

> "*The proceedings are directly relevant Part IVC appeals in the Federal Court. One aspect of the relief sought was to obtain a copy of the letter of Request from the Commissioner to the CITIA, supporting materials and reasons for decision of the CITIA in providing materials for the Commissioner of Taxation. This will facilitate a submission to be made to the Federal Court of Australia by Bywater, that the documents annexed to McKay's affidavit were improperly obtained and ought not to be received into evidence in the Part IVC proceedings.*"

Accordingly, the Attorney submits that the actions on the part of the Applicants and their privies in Australia are an abuse of process, as the Applicants are seeking to re-litigate the same questions in different fora.



DUTY OF ENQUIRY

118. The Applicants have submitted that under the doctrine contained in ***Secretary of State for Education and Science v. Tameside Metropolitan B.C.*** [1977] A.C. 1014 where Lord Diplock stated at page 1065:

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

119. The Attorney submits that the duty of enquiry is a duty to make only such enquiries as are necessary to satisfy the Respondent, and that the scope and scale of the enquiry is primarily a matter for the Respondent.

120. The Respondent's position is that the burden lies on the Applicants to show that, based on the information set out in the Request, that it was necessary for the Respondent to make enquiries. Furthermore, the Respondent contends that the burden rests on the Applicants to show what enquiries should have been made by the Respondent.

121. The Respondent submits that there was no indication upon the face of the Request that there was any live issue that warranted exploration and further, the burden rests upon the Applicants to show that, based upon the information contained in the Request, there was a live issue, and further, to answer the question of what the live issue was.

122. The Respondent contends that it was clear the ATO provided in the Request all that was required for the Respondent to satisfy itself that the Request was in compliance with the Tax Information Agreement. Based on the information made available to the Respondent by the ATO the Respondent submits that the Request was complete and there was nothing that would put a reasonable competent Authority in the position of the Respondent on enquiry as suggested by the Applicants.

123. The Respondent relies upon the case of ***Coxon v. Minister of Finance et al*** Civil Appeal No. 5 of 2007 before the Bermuda Court of Appeal and states:

> *"Courts have found that generally the authorities responsible for executing international Requests had no obligation to question the certification of the relevant requesting author*ity."

The Attorney cites ***Coxon***, which itself cited the judgment of ***Bermuda Trust Company Limited et al v. Minister of Finance*** [1996] BDA LR45 where Ground J., (as he then was) stated:

> *"But a primary purpose of international arrangements such as the convention has to be to avoid the need for the requesting state to become embroiled in litigation in request jurisdiction. Moreover, to attempt to decide these issues would involve the Court in considerations of US tax law, and procedure, and might also require it to adventure upon a consideration of the very matters in respect of which the request is made..... the Court's function is to examine the decision to implement the request to see if it was taken in compliance with the relevant laws and if it was not, to consider what to do about it."*

124. The Attorney highlights the fact that Ground J. relied upon the judgment of Georges JA in ***Bertoli & Ors v. Malone*** (1990-91) CILR 58 and submits that the Respondent must assume the correctness of the information laid before it in the Request. The Authority therefore could not receive evidence to raise doubts as to the information.

125. The Attorney submits that the Respondent was entitled to go no further than the requirement that it ensures that Article 5(5) of the Tax Information Agreement had been complied with, unless there was something on the face of the Request that justifies it doing so. The Attorney submits that it is not for the Respondent to go outside of the boundaries of Article 5(5).

126. On this point the Attorney also relies on the ***Global Forum on Transparency and Exchange of Information for Tax Purposes, Handbook for Assessors and Jurisdictions***, and the handbook comments on Article 26 of the OECD Model Tax Convention on Income and Capital which state at paragraph 87 on page 135:

> *"A requested party is under no obligation to research or verify the statements provided by the Applicant Party. The responsibility for the accuracy of the statement lies with the Applicant Party."*

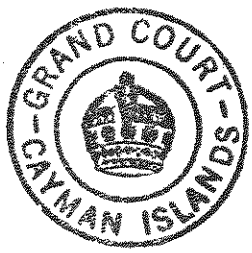
The Attorney submits that any issue as to the propriety of action taken in Australia is a matter which can be and must be raised in the courts in Australia which, by reason of jurisdiction and comity, are the proper fora for adjudicating on that matter.

OBLIGATION TO APPLY TO THE GRAND COURT

127. The Attorney refers to the Applicants' submissions where they contend that the Respondent should have made an application to the Grand Court pursuant to s.8(4)(a) of the Tax Information Agreement and further, that the Applicants should have received notices pursuant to s.17(1) of the TIA Law.

128. In response to this the Attorney submits that the Respondent was entitled to take the ATO at its word that the tax purpose for which the information was sought was for an investigation. Accordingly, the Attorney submits that s.8(4)(a) of the TIA Law did not apply and that the Respondent was therefore not obliged to make an application to the Grand Court.

129. The Attorney submits that when the Respondent received the first Request and it made its decision to execute it, it was neither averred by the ATO that it was for proceedings, nor was it in any way apparent from the terms of the Request that it was for proceedings, and, therefore, the Respondent was entitled to exercise its power to issue a notice under s.8(4)(b) of the TIA Law. Furthermore, the Respondent contends that, upon a reading of the first Request, and the second, third and fourth Requests, it is repeatedly stated that they were for active investigations being undertaken by the ATO and, therefore, the Respondent submits, there was no obligation on the Respondent to make an application under s.8(4)(a) of the TIA Law.



SECTION 17 NOTICE

130. The Respondent maintains that, in relation to s.17(1) of the TIA Law where the notification is triggered, it does not entitle the subject of the Request to be notified of the details of any of the matters under Article 5(5) of the Tax Information Agreement. Accordingly, the Attorney submits that the subject of the Request is only entitled to know the general nature of the information sought, but it does not extend to the subject being entitled to enquire into the details. Furthermore, the Attorney submits it does not entitle the mere holder of the information – in this case, FCM – to be notified at all.

131. The Attorney submits that, as the provision does not entitle the subject of the Request to be notified of the tax purpose for which the information is sought, it is submitted that a subject of the Request, and, in this case, the Applicants, would not be entitled to make submissions which would require the Respondent to resolve factual disputes involving contentious issues as to Australian tax laws. The Attorney also submits that this Court should not be invited to resolve these issues.

132. The Attorney contends that, on a reading of the first Request in its totality, the Respondent was reasonable in taking the view that the requirements of Article 5(5) were more than adequately satisfied in the Request. The Attorney submits that s.17(1) involves a very narrow construction, and any wider construction of the right of the subject of the Request to receive prior notification and to make submissions under s.17(1) would undermine the very basis for mutual assistance.

133. The Attorney submits that s.17(1) has not been triggered. The Attorney submits that even if s.17(1) had been triggered, the Applicants might not have been entitled under that provision to point out the "failures" of the Respondent or the ATO that could be properly adjudicated on by the Respondent.

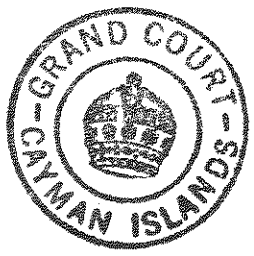
134. Accordingly, the Attorney submits that, under the Tax Information Agreement the Applicants might only have been entitled to make written submissions regarding whether the information is protected or not under the Tax Information Agreement. Further, the Attorney submits that the final decision on whether the information should be sent to the Requesting Party lies with the Respondent. The Attorney submits that, as there is no evidence before the Court that any of the information fell within the categories outlined in Article 7(2) and (3). Accordingly the Respondent contends that if, which is denied, s.17(1) of the TIA Law were applicable, there is no evidence that the Applicants would have suffered any prejudice.

135. Finally on the s.17 point, the Attorney submits that the Applicants are not the subject of the Request but merely the holders of the information. It is submitted that the Request identified Mr. Gould and Mr. Leaver as being the persons who were under examination or investigation. Accordingly, it was reasonable for the Respondent to conclude that Mr. Gould and Mr. Leaver, and not the Applicants, were the subjects of the Request. Pursuant to s.17(4) the Respondent was not required to search for, or conduct, enquiries into the address or whereabouts of the subject of the Request. The Attorney told the Court that if the Respondent hears that Mr. Gould or Mr. Leaver visited Cayman and it found out where they were staying, it could then serve them with s.17 Notices.

136. The Respondent contends that Article 1 of the Tax Information Agreement sets up the framework for mutual assistance between the Cayman Islands and Australia. By virtue of Article 1, Australia only needs to demonstrate, and the Respondent only needs to be satisfied, that the information requested is "foreseeably relevant" to the administration and enforcement of its domestic tax laws. Article 5(5) describes the information required to be provided to the Respondent in order to establish foreseeable relevance.

137. The Attorney submits that Article 5(1) of the Tax Information Agreement obligates the Respondent to provide the information upon request for the purposes outlined in Article 1. Article 5(6) mandates the Respondent to forward the requested information as promptly as possible to Australia.

138. The Attorney further submits that the statutory and regulatory context of the Respondent's powers is similar to the powers of the Mutual Legal Assistance Authority in the Mutual Legal Assistance (United States of America) Law (1999 Revision). The Attorney submits that the Mutual Legal Assistance Treaty (MLAT) is predicated on similar principles to the TIA Law. The Attorney relies again upon the Court of Appeal decision in ***Bertoli*** (which is affirmed by the Privy Council) and states that the duties of the Respondent are more circumscribed than the duties of the MLAT. Accordingly, the Attorney argues that, under Article 5 of the Tax Information Agreement, the obligation for good administration is that the Requesting Party has the use of the information in as fast a time as possible.



ANALYSIS AND CONCLUSION

UNDUE DELAY

139. In order to determine whether there was undue delay, the Court has to review the relevant material facts which brought about the Applicants' application for leave to apply for judicial review pursuant to GCR. O.53 on the 18th September 2012.

140. The Applicants' application was grounded by the affidavit of Mr. Page sworn on the 18th September 2012. Mr. Page is a barrister acting for the taxpayers and is instructed by Davis Henry York in Sydney, Australia. Mr. Page had been instructed since August 2010 to advise and appear in Australian court proceedings on behalf of the four Taxpayers, which, he deposed, were subsidiary entities of the Applicants. Furthermore Mr. Page deposed to the fact that the Taxpayers are owned by the Applicants – either directly or through interposed companies.

141. In this affidavit Mr. Page refers to the various proceedings brought before the Courts in Australia. At paragraph 24 he states that on or about the 20th June 2012 Henry Davis York was served with an affidavit prepared by an officer of the ATO (Mr. McKay), confirming that the ATO proposes to use, in all four of the Part IVC appeals a large number of documents relating to the Applicants.

142. Mr. Page stated that Mr. Borgas, who was a director of both of the Applicants, was not aware that the confidential documents had been obtained by the ATO and further he had never given permission to FCM to disclose the documents to the ATO or anyone else.

143. When the Applicants' *ex parte* application for leave to apply for Judicial Review came before me on the 2nd November 2012 I was of the view that the Applicants had a sufficient interest in the subject matter of the leave application. I also found that the Applicants had arguable grounds, with some realistic prospect of success pursuant to the principles set out by the Cayman Islands Court of Appeal decision in ***Cable & Wireless (Cayman Islands) Ltd. v The Information & Communications Technology Authority*** [2008] CILR Note 6.

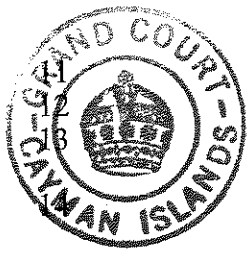
144. On the question of time, the Applicants and the advisors realised that the information must have come as a result of a Request from the ATO to the Respondent pursuant to the Tax Information Agreement. However, I accept that from the evidence before me that the Applicants had no way of knowing when that Request was made or when the Respondent complied with the Request.

145. The Applicants' Cayman attorneys wrote to the Respondent well within the 3-month period of time allowed for by GCR O.53 r.4(1), asking for a copy of the Request and the basis on which the Respondent complied with the Request. Mr. Nicol, on behalf of the Respondent refused to provide a copy of the Request or any information in relation to the Request or his Decision on the ground that such information was confidential under the Tax Information Agreement.

146. The Applicants' attorneys wrote to Mr. Nicol asking him to reconsider his Decision and on the 13th September 2012 Mr. Nicol wrote to the Applicants attorneys saying he was not prepared to address the substantive arguments and was not going to reconsider the Decision. Consequently, on the 18th September 2012 the Applicants applied, pursuant to GCR O.53 for leave to judicially review the Respondent's Decision which lead to their information being sent to the ATO.

147. On the 2nd November 2012 the Applicants' leading counsel Mr. Lowe, Q.C., submitted to the Court that the Applicants were suffering from a lack of knowledge, that is, not knowing when the Request from the Requesting Party was made or the date when the Respondent decided to comply with the Request. Consequently, the Applicants applied for an extension of time – submitting that there were good reasons for extending the period within the which the application should be made pursuant to GCR O.53 r.4(1).

148. As a result of these representations, and the fact that the Applicants had engaged in communications with the Respondent, I granted the Applicants an extension of time. I stated:



> *"It was clear that there were ongoing discussions and negotiations with the Authority. You had no knowledge when the decision was made and no knowledge of when that application was made."*

I also added that, in my view, it was a matter of public importance and, accordingly, the extension of time was granted.

149. The House of Lords in ***R v. Criminal Injuries Compensation Board Ex Parte A*** (1999 2 A.C. 330) stated in the first holding pursuant to the judgments of Lord Slynn of Hadley and Lord Nolan:

> *"If leave to apply for judicial review out of time was granted ex parte on the ground that good reason for extending the time has been shown within R.S.C., ORD. 53 r4 (1) , the question of whether leave should be granted did not fall to be reopened at the substantive hearing."*

150. Accordingly, the extension of time, which I granted to the Applicants on the 2nd November 2012, will not be disturbed.

151. The Court does accept that s.31(6) of the Senior Courts Act 1981 applies to the Cayman Islands by virtue of s.11 of the Grand Court Law (2008 Revision) and was recently examined in the case of ***Ackermon v. National Roads Authority and Cayman Islands Government***[4] and is an issue which can be adjudicated upon at this *inter partes* hearing.

152. The Respondent has not filed any Summons to strike out the leave granted by this Court on the grounds of "*causing substantial hardship to, or substantially prejudicing the rights of, any person or [being] detrimental to good administration.*" Furthermore, when I examine the evidence filed by the Respondent in these proceedings I do not consider the extension of time and/or the leave, is likely to cause substantial hardship to, or is substantially prejudicial to the rights of any person, or is detrimental to good administration.

153. If I count the time from on or about the 20th June 2012 when the McKay affidavit was served on Davis Henry York until the 18th September 2012, the Applicants are within the 90-day time period allowed under GCR O.53 r.4.

154. Accordingly, I reject the Respondent's argument in the circumstances that existed on the 18th September 2012 that there has been undue delay.

[4] Judgment of Quin J. dated the 1st May 2013 in Grand Court Cause 85/2013 – ***Rupert Ackermon v. The CIG and the NRA.***

MATERIAL NON-DISCLOSURE

155. The Attorney complains that the Applicants never revealed:

a. That the Australian Recovery Proceedings concluded on the 25th November 2010, which they must have known.

b. That the application for the freezing orders had been granted to the Commissioner of Taxation.

c. That the Judicial Review and discovery proceedings brought in Australia were dismissed on the 17th September 2012.

156. I find, which has been conceded in the Respondent's written submissions, that Ms. Lucy, in her affidavit, sworn on the 25th October 2012, specifically referred to the Judgment of Justice Perram in the Federal Court of Australia for judicial review and preliminary discovery at paragraph 25 of her affidavit. I therefore find that there was no material non-disclosure of these proceedings in light of the clear reference to this case by Ms. Lucy.

157. On the question of the conclusion of the Recovery Proceedings by the Judgment of Kenny J., Mr. Zafiriou states at paragraph 14 of his affidavit that Judgment was obtained on the 25th September 2010 and makes the point that

> "*The material sought from the first Request was irrelevant to the Recovery Proceedings and has not been relied upon by the Deputy Commissioner in aid of the Recovery Proceedings.*"

158. Mr. Page at paragraph 24 of his third affidavit sworn on the 29th July 2013 disagrees with both assertions made in Mr. Zafiriou's affidavit. Mr. Page states:

> *"If information obtained from the Cayman Islands is relevant to the Part IVC appeals of the Australian entities and will be adduced as evidence in those Part IVC appeals, then it is also relevant to the associated Recovery Proceedings. The reason is that the merits of the parties' respective cases in pending Part IVC appeals is [are] an issue in the Recovery Proceedings. At every stage of BID672/2010 and BID887/2010 the Australian entities have argued that they will succeed in their Part IVC appeals. In the Federal Court judgment DCT v. Chemical Trustee (Number 8) [2013] FCA 494 at paragraphs [46] – [88], which was a decision in VID887/2010, the Court especially reviewed the evidence that the ATO has filed in, and proposed to rely on in the Part IVC appeals."*

And, at paragraph 24 Mr. Page states:

> *"Paragraph [73] of the Judgment in DCT v. Chemical Trustee (Number 8) [2013] FCA 494 shows that the ATO relied on the Cayman Islands documents in VID887/2010, albeit without seeking to tender those documents."*

159. There is clearly a conflict between the evidence of Mr. Zafiriou and Mr. Page. It is impossible to resolve this conflict on affidavit evidence but, based on the evidence before me, it is my view that there has been no material non-disclosure by the Applicants and, accordingly, I reject this submission on behalf of the Respondent.

ABUSE OF PROCESS

160. The Respondent complains that these proceedings are an abuse because they mirror the proceedings brought by the four Taxpayers for Judicial Review and Preliminary Discovery before the Federal Court of Australia – notwithstanding that the parties are different and the instant proceedings are a challenge to the Decisions of the Respondent.

161. It is the Respondent's case that the Cayman Judicial Review proceedings and the Australian Preliminary Discovery proceedings were both instituted with the objective of obtaining:

a. copies of the Requests; and

b. findings from the Cayman and Australian Courts that the information that the ATO was seeking to obtain was for the purpose of the Part IVC Proceedings.

162. It is accepted by all concerned that the Applicants own the four Australian Taxpayers either directly or through interposed companies. However, the Applicants are independent Cayman Islands companies that are seeking to challenge the four Decisions made by the Respondent in respect of four separate Requests from the ATO.

163. Having applied for and being granted leave to bring Judicial Review proceedings which examine the four Decisions by the Respondent in relation to the four Requests, I find that these proceedings are proper, and are proceedings which the Applicants are entitled to bring against the Respondent. The Applicants, although related to the four Australian Taxpayers are entirely independent parties and I cannot find any good reason for concluding that their entitlement to challenge the Decisions of the Respondent, namely the CITIA, cannot properly proceed to final determination.

164. My order for discovery of the first two Requests was to enable the Court and the parties to review what the Requests stated and to have a fuller picture of the facts. As I stated in my Judgment dated the 28th February 2012, discovery of the two Requests was clearly in the interests of a fair disposal of the case.

165. The Applicants are claiming that the Respondent's actions were unlawful because they were outside of the Tax Information Agreement made between the Cayman Islands and Australia, which is only justiciable in the Cayman Islands and could never be brought in Australia.

166. For the above reasons I reject the Respondent's submission that these proceedings are an abuse of process.

THE TIA LAW AND THE TAX INFORMATION AGREEMENT

167. Under the TIA Law the Financial Secretary is designated as the Tax Information Authority and the CITIA is to exercise its functions under this law and under the Tax Information Agreement with Australia.

168. Under s.7(1) of the TIA Law the CITIA shall determine whether the Request is in compliance with the relevant scheduled Agreement, in this case, the Sixteenth Schedule being the Tax Information Agreement with Australia. If it is determined that there is compliance

> *"...the Authority shall execute the Request in accordance with, but subject to, the provisions of the Tax Information Agreement and this Law."*

169. Under s.7(2) the Respondent may request such additional information from the Requesting Party as may be necessary to assist it in executing the Request.

170. The Court reminds itself of s.8(1) of the TIA Law which reads:

> *"Where under a Request any person is required to testify, the Authority shall apply to a Judge for the Judge to receive such testimonies as appears to him to be appropriate for the purposes of giving effect to the Request."*

And s.8(4) provides:

> *"Where the Authority considers it necessary to obtain specified information or information of a specified description from any person, the Authority shall –*
>
> *(a) In the case of information required for proceedings in the territory of the Requesting Party or related investigations, apply to a Judge for an order to produce such information or*
>
> *(b) In the case other than that referred to in paragraph (a) issue a notice in writing requiring the production of such information as may be specified."*

171. Section 17(1) as set out in paragraph 19 above provides that:

> *"....a person who is the subject of a request for information solely in relation to a matter which is not a criminal matter or an alleged criminal matter, shall if his whereabouts or address is made known to the authority be served with a Notice by the Authority advising of the existence of a Request specifying that person, the jurisdiction making the request and the general nature of the information sought. And any person so notified may within fifteen days from the date of receipt of the notice make a written submission to the Authority specifying any grounds which he wishes the Authority to consider in making its determination as to whether or not the Request is in compliance with the provisions of the relevant scheduled Agreement."*

It is clear then that the subject of a Request is entitled to receive a Notice if his address is known and make written submissions to the CITIA. It is also clear that the CITIA, in this case, the Respondent, is required to consider the submissions in making its determination as to whether or not the Request is in compliance with the provisions of the Tax Information Agreement.

172. Section 13 and Article 8 of the TIA Law, and Article 8 of the Tax Information Agreement mandate that the information received shall be kept confidential.

173. Section 19 of the TIA Law states that s.4 of the CRPL shall be deemed not to apply to confidential information given by any person in conformity with a Request under the TIA Law.

174. The CITIA, as the Authority for the Requested Party has a discretion, and, before making any decision, must satisfy itself that it does not need any further information from the revenue authority of the Requesting Party.

175. It is common ground between both counsel that the general principle is that a public body has a duty to acquaint itself with information relevant to the performance of its functions and decisions. This is based on the dicta of Lord Diplock in the House of Lords decision in ***Tameside***. As Lord Diplock said at letter F on page 1064:

> *"The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred."*

176. In adopting Lord Diplock's words at B on page 1065, the question for this Court is did the Respondent ask itself the right questions and take reasonable steps to acquaint itself with the relevant information to enable it to answer whether the Request from the ATO complied with the TIA Law as read with the Tax Information Agreement.

177. From a review of the Respondent's letters to the Applicants' Cayman Islands attorneys and its submissions, the Attorney General, and indeed, the Respondent, seem to suggest that all the Respondent had to do is satisfy itself that the Request was certified by the ATO as being in compliance with the Agreement and particularly the requirements of Article 5. The Honourable Attorney General prays in aid the Bermuda Court of Appeal decision of ***Coxon et al v. The Minister of Finance & Ors*** Civ Appeal No. 5 of 2007 and the Cayman Islands Court of Appeal decision in ***Bertoli***.

178. I reject the submission that the Respondent had no reason to seek clarification, and further, that there was no ***Tameside*** duty to make an enquiry. In my judgment of the 28th February 2013 allowing for discovery of the Request I stated at paragraph 111 that in the Bermuda Court of Appeal case of ***Coxon*** and the Cayman Islands Court of Appeal case of ***Bertoli***, the target of the Request had no legal right to seek documentation or information from the Authority – being the Minister of Finance in Bermuda and the MLAT in Cayman. Furthermore, neither the Minister of Finance in Bermuda nor the MLAT in Cayman had any right to question the certification of the relevant United States Authority. In addition, there were no provisions in either the USA-Bermuda Tax Convention Act 1986 or the Cayman Islands Mutual Legal Assistance (USA) Law 1986 to give the targets any right to make written submissions let alone to apply for discovery. As I stated at paragraph 115 of my February 2013 judgment, in ***Coxon*** and ***Bertoli*** the Requested Authority was under no obligation to consider whether the subject of the Request should be heard. There was no corresponding provision to s.17(1) of the TIA Law. Furthermore, there was no equivalent of s.8(4)(a) of the TIA Law where the CITIA applies to a Judge in the case of information required for proceedings in the territory of the Requesting Party or related investigations for an Order to produce such information.

179. Mr. Cheetham in his affidavit dated the 5th April 2013 is correct to stress the importance of international cooperation in relation to the Commissioner's role, and the fact that Australia treats these relationships carefully with a high degree of concern, in order to maintain working relationships, which assist ATO in carrying out its statutory role.

180. Somewhat ironically, the CRPL has been in existence for almost 40 years and the Cayman Islands Courts have been acutely aware of the principles of international judicial comity. On frequent occasions our Courts have adopted the classic approach from Lord Denning in ***Rio Tinto's Inc. Corporation v. Westinghouse Electric Corporation*** (1978) A.C. 547 at page 560 where he said,

> *"It is the duty and the pleasure of the English [Cayman] Court to do all it can to assist the foreign court, just as the English [Cayman] Court would expect the foreign court to help it in like circumstances."*

181. As a result, this Court has frequently adopted the s.4 CPRL gateway provision to allow evidential discovery to be provided to foreign Courts, which otherwise would be difficult to obtain. This Court recognises that the Respondent owes a duty to do everything it can to assist the ATO, but in doing so it must also ensure that the rights of the Applicants are not infringed and that there is compliance with the TIA Law and the Tax Information Agreement.

182. I find that the Respondent must ensure that the information sought relates to tax years and taxable periods after the 1st July 2010. Furthermore, the Respondent will be aware that if the Request seeks information for taxable periods before the 1st July 2010, then there would be a breach of the CRPL. The Respondent also will be aware of the Applicants' rights of privacy under Article 9 of the Bill of Rights and to a fair and public hearing under Article 7.

183. I accept the Applicants' contention that the Bill of Rights which came into force on the 6th November 2012 must lead the Court to apply a more anxious level of scrutiny and standard of review, just as the Human Rights Act influenced the approach adopted by the Courts in England and Wales. This has led to what Michael Fordham described in the Sixth Edition of his ***Judicial Review Handbook*** at paragraph 9.1.2 as "an enhanced rights-based culture."

184. In the recent case of ***Axis International Ltd. v. The Civil Aviation Authority of the Cayman Islands and Cayman Islands Helicopters Limited*** (Cause Number 56 of 2012 dated the 24th May 2013), the learned Chief Justice at paragraph 313 stated:

> *"It is in this context that the Court is invited by way of "anxious or heightened scrutiny", to have regard to the rights provided for by the constitution of the Cayman Islands Order 2009 and, in particular, in its Bill of Rights Freedoms and Responsibilities (the "Bill of Rights") enshrined in Schedule 2, and which became effective in the Cayman Islands on the 6th November 2012."*

185. The Chief Justice in noting that the decision for judicial review was a pre-Bill of Rights decision stated at paragraph 314:

> *"The Court, being itself bound to give effect to the principles enshrined in the Bill of Rights, should have regard to relevant constitutionally protected Rights when determining the intensity of judicial review appropriate to this case...."*

186. The Respondent clearly has a duty to do everything it can to assist the ATO in a timely manner, but it also has a duty to ensure that the Applicants' rights are not infringed, and that its actions are not unlawful. It is in this context that I now review the four Requests in order.

FIRST REQUEST

187. On the 23rd February 2011 the ATO issued a Request for information in accordance with Article 5 of the Tax Information Exchange Agreement in connection with an active investigation into the Australian taxation affairs of Mr. Gould and Mr. Leaver. The ATO stated that it needed specific information in relation to the Applicant companies.

188. The ATO informed the Respondent that the Applicants are the controlling parties of Derrin Brothers, which has derived significant profits from trading in shares listed on the Australian Securities Exchange. The ATO also informed the Respondent that the second Applicant, JA Investments, is the parent company of Chemical Trustee and Chemical Trustee has derived significant profits from trading in shares listed on the Australian Securities Exchange.

189. The Request confirmed that Mr. Gould had provided information to the ATO regarding the Applicants and he had supplied correspondence from FCM on the names of directors, officers and members of the Applicant companies.

190. The ATO specifically stated that it had concerns regarding transactions to evade tax properly payable in Australia, by using the Applicants and further, that Mr. Gould and Mr. Leaver are the ultimate beneficial owners of the Applicants and have omitted income and/or over-claimed deductions in their Australian income tax returns.

191. Under the heading "The Tax Purpose for which the Information is Sought" the ATO stated:

> *"The active investigation of Mr. Gould and Mr. Leaver is over a number of years to the present, including a "real time review" of the current Australian financial year ending the 30th June 2011 for both Taxpayers."*

192. The ATO states that, in relation to the "real time review" it could make an Assessment of the taxable income derived in that year or any part of it. Further, the ATO said that it needed the information to assist in determining:

> *"the Australian income tax payable by Mr. Gould, Mr. Leaver and/or their associate entities for the taxable period commencing the 1st July 2010."*

Two questions the Respondent might have asked the ATO are: Is there a definition under Australian tax legislation for "real time" review, and what does it exactly mean.

193. Leading counsel on behalf of the Applicants complains that the ATO deliberately delayed taking steps in order to delay the inevitable Part IVC proceedings which were issued by the Taxpayers on the 16th May 2011. The four Taxpayers including Chemical Trustee and Derrin Brothers lodged reasonable objections on the 13th September 2010 in accordance with the Part IV procedure. Leading counsel submits that the ATO took six months to disallow the Taxpayers Objections, which the ATO knew would inevitably trigger court proceedings. It is the Applicants' contention that the proceedings commenced by the Australian Taxpayers on the 16th May 2011 – known as the Part IVC Proceedings, were inevitable.

194. It is clear from the evidence before this Court that the Deputy Commissioner had commenced proceedings for freezing Orders in relation to the four Australian Taxpayers, including Derrin Brothers and Chemical Trustee. The ATO did not inform the Respondent of these Australian proceedings in its first Request.

195. On the 31st August 2012 Justice Perram in proceedings before the Federal Court of Australia - ***Derrin Brothers and Chemical Trustee v. the Commissioner of Tax*** NSD799/12; ***Chemical Trustee v. Commissioner of Tax*** NSD654/10; ***Derrin Brothers v. Commissioner of Tax*** NSD656/10 stated at paragraph 4 of his Judgment:

> *"The present litigation – which includes enforcement proceedings, appeals under Part IVC of the Taxation Administration Act 1953 (CTH) and the judicial review and preliminary discovery applications – arises from the issue by the Commissioner of Notices of Assessment to the various Taxpayers on the 12th August 2010."*

At paragraph 5 Justice Perram states:

> *"At the same time as the Commissioner issued Notices of Assessment he also sought from this Court, and obtained, freezing Orders against the Taxpayers restraining them from dealing with certain parcels of shares: Deputy Commissioner of Taxation v. Hua Wang Bank Bearheart (2010) 273 ALR 194; [2010] FCA 1014; Leave to Appeal refused in Hua Wang Bank Berhad v. Deputy Commissioner of Taxation (2010) 818TR66; [2010] FCA FC140"*

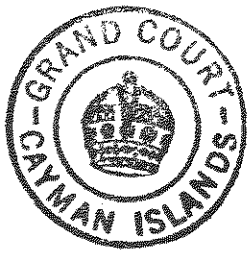
At paragraph 6 Justice Perram states:

> *"These Orders remain in place although they have been subject, over time, to some variations."*

Furthermore at paragraph 8 Justice Perram states:

GRAND COURT - CAYMAN ISLANDS

> *"Before the Commissioner had concluded his deliberations on the objections he applied for, and obtained summary judgment against each of the Taxpayers on the basis of the non-contestable nature of a Notice of Assessment: Deputy Commissioner of Taxation v Hua Bank Berhad (Number 2) [2010] AD1 ATR 40; [2010] FCA 1296"*



Justice Perram then went on to state at paragraph 9:

> *"Having obtained those judgments he (the Commissioner) then sought to enforce the judgments against certain assets held by the Taxpayers in Australia. These proceedings took the form of charging summonses against shares held by the Taxpayers in ASX-traded Shares."*

At paragraph 10 Justice Perram states:

> *"In the meantime, the Commissioner had rejected the Taxpayers' Objections on the 30th March 2011 and thereafter the Taxpayers commenced appeal proceedings in this Court under Part IVC of the Taxation Administration Act."*

196. Accordingly, on the 23rd February 2011 the Commissioner had obtained summary judgment against the four Taxpayers. Although the Attorney submits that the Recovery Proceedings concluded with Justice Kenny's Order for summary judgment on the 25th November 2010, it seems from Justice Perram's Ruling dated the 31st August 2012 that the Commissioner sought to enforce judgments against certain assets held by the Taxpayers in Australia. Furthermore, the freezing orders against the four Taxpayers, including Chemical Trustee and Derrin Brothers, obtained on the 12th August 2010, as Justice Perram states, remained in place and had been subject over time to some variations.

197. I accept the Applicants' contention that 12 months had not elapsed since the 1st July 2010 and therefore the Taxpayers' liability for the first year after the Tax Information Agreement came into force, does not start to run until the 30th June 2011. However, from the evidence before this Court this does not prevent the Australian Commissioner of Taxation making an assessment of the taxable income at any time from the 1st July 2010 to the 30th June 2011.

198. If I place myself in the shoes of the Respondent I would have been concerned by the curious contradiction that the first Request stated that the tax purpose for which information is sought covers the active investigation of Mr. Gould and Mr. Leaver over a number of years to the present. And yet the ATO would know that it could only apply to taxable periods after the 1st July 2010.

199. Against the background of what the Chief Justice accepted as "anxious or heightened scrutiny" and the Respondent's ***Tameside*** duty, I ask myself the following question: If the ATO had informed the Respondent of the Recovery Proceedings leading to the judgment of Kenny J.[5], the freezing orders obtained by the Deputy Commissioner over the four Taxpayers' assets, and the fact that the Taxpayers' Objections pursuant to Part IVC of the Taxation Administration Act 1953 would lead, inexorably to Part IVC proceedings being lodged before the Courts of Australia, what would the reaction of the Respondent have been?

200. Add to that rhetorical question, the fact that the first Request stated that the active investigation of Mr. Gould and Mr. Leaver was over a number of years, how would the Respondent view this new information in light of the wording of s.8(4)(a) of the TIA Law which states:

[5] Dated the 25th November 2010.

> *"In the case of information required for proceedings in the territory of the Requesting Party or related investigations, apply to a Judge for an Order to produce such information."*

201. It is my view that had the Respondent been informed of these facts by the ATO, it would have found that the investigations described as Operation Rubis either related to proceedings that had already commenced or alternatively, were going to inevitably lead to the Part IVC proceedings which were commenced by the four Taxpayers on the 18th May 2011.

202. As Mr. Nicol stated at paragraph 15 of his affidavit after he had sight of Mr. Page's first Affidavit:

> *"The competent Authority at all times acted upon representations made in the Request by the Requesting Party, that the Request was in connection with an active investigation into the Australian tax affairs of X and Y and in respect of the taxable period commencing July 1st 2010. The competent Authority has no direct knowledge of the litigation in Australia in respect of income tax liabilities assessed for years falling within the periods 2000 – 2007 or of the Recovery proceedings or the appeal proceedings referred to Mr. Page's affidavit."*

203. The question for this Court is: Did the Respondent ask itself the right questions and take reasonable steps to acquaint itself with the relevant information before it came to its decision to provide the information belonging to the Applicants. The Respondent's lack of knowledge of the material facts that Australian proceedings had been commenced, and further, that contemplated Australian proceedings under Part IVC were somewhat inevitable, is clear.

204. The Court recognises that the CITIA receives many requests from foreign revenue authorities for information under the TIA Law. It is important that the Respondent ensures that it acts within the TIA Law and the relevant Tax Information Agreement with the Requesting Party. There should always be a duty on the foreign revenue authority of the Requesting Party to ensure that disclosure to the CITIA is full and frank. In order to ensure that the TIA Law is complied with and the rights of the subject of the Request are not infringed the Respondent should ask the Revenue Authority of the Requesting Party the following questions:

i. Is the information you are seeking solely for taxable periods after the relevant Tax Information Agreement came into force? If the answer is yes, then, subject to the answers to the next three questions, the Respondent can proceed under s.8(4)(b) of the TIA Law and issue a production notice. If the answer is no, then the Respondent would need to re-consider its position.

ii. Have there been any proceedings relating the Request that are concluded?

iii. Are there any existing proceedings relating to the Request?

iv. Is the information sought in the Request required for contemplated proceedings?

In this case, if the Respondent had asked the ATO these four questions, the answers would be yes. As s.8(4) (a) refers to information required *for* proceedings. It is my view, from reading all the evidence before me, that the information the ATO was seeking in its first Request was information to be used in the Part IVC proceedings. As was foreshadowed in Kenny J's Judgment, the Taxpayers issued proceedings between the first and second Requests, and this Court has been told that the McKay affidavit exhibited significant confidential information belonging to the Applicants, was filed in the Australian Part IVC proceedings.

205. Accordingly, I find that the Respondent was in breach of its ***Tameside*** duty, in that, it should have requested additional information pursuant to s.7(2) of the TIA Law from the ATO in relation to the use of information for periods before the 1st July 2010, and, whether or not the investigations related to proceedings, or alternatively, whether the proceedings in Australia related to the investigations.

206. I find that the Respondent's Decision to issue the Notice to Produce pursuant to s.8(4)(b) of the TIA Law infringed the Applicants' rights of privacy and to a fair and public hearing in the determination of their rights pursuant to Articles 9 and 7, respectively, of the Bill of Rights.

THE SECOND REQUEST

207. The Second Request from the ATO was issued on the 27th May 2011 and received by the Respondent on the 20th July 2011.

208. On the 16th August 2011 the Respondent sent two Notices to Produce to FCM. On the 16th September 2011 the Respondent received the information from FCM relating to the Applicants and sent it to the ATO on the 20th September 2011.

209. In this Request the ATO submits that it is in accordance with Article 5 of the Tax Information Agreement, and it seeks information regarding shareholdings of JA Investments from the 14th April 2003 to the 6th February 2009 as well as copies of all correspondence and documents held by FCM in relation to transfer of shares on or around the 14th April 2003 and the 6th February 2009.

210. The ATO confirms that the tax purpose for which the information is sought is for the active investigation of Mr. Gould and Mr. Leaver over a number of years to the present year, including a "real time review" of the current Australian financial year ending 30th June 2011. The ATO goes on to state that:

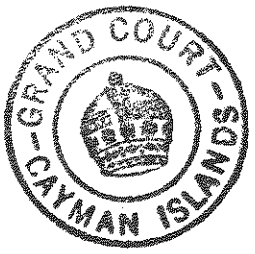
> *"Although the information requested relates to a period prior to 1st July 2010 the historical information is necessary to determine the true beneficial owner of JA Investments Limited for taxation matters arising after 1st July 2010."*

211. The Court notes that, again, the ATO did not inform the Respondent of the Recovery Proceedings or of Justice Kenny's summary judgment, or of the Part IVC Proceedings commenced by the four Taxpayers on the 16th May 2011.

212. Again, the Respondent did not make any enquiries of the ATO regarding whether any proceedings were on foot, or whether the investigations related to any proceedings. Furthermore, the Respondent did not ask any questions as to whether the information was going to be used to establish liability for tax years commencing before the 1st July 2010. Consequently, I find that the Respondent was in breach of its ***Tameside*** duty.

213. If the Respondent had asked the questions I set out in paragraph 204 (*supra*) it would have discovered that there had been proceedings against the taxpayers and further, that the Taxpayers had issued Part IVC proceedings against the ATO. The Respondent would then have complied with s.8(4)(a) of the TIA Law and applied to a Judge for an order to produce such information.

214. As with the first Decision, I find that the Respondent's second Decision to issue the Notice to Produce pursuant to s.8(4)(b) of the TIA Law, infringed the rights of the Applicants under Article 9 and Article 7 of the Bill of Rights.



THIRD REQUEST

215. On the 19th October 2011 the ATO sent the third Request to the Respondent. The ATO wrote to the Respondent in this Request stating:

> *"In order for the United Kingdom Tax Authority to issue the Production Notices they are required to institute proceedings through an independent tribunal. This process will necessitate providing a submission to the independent tribunal with supporting documents to establish why the action is warranted. The documents you provided to us would greatly assist the United Kingdom Authorities to make their case on behalf of the ATO. Accordingly, we request your permission to disclose documents to the United Kingdom, HM Revenue and Customs."*

216. On the 21st November 2011 the Respondent wrote to the ATO and stated that it consents to the disclosure of the information to HMRC as United Kingdom competent authorities.

217. It is clear from the contents of the third Request that the ATO was aware of his obligations under Article 8 of the Tax Information Agreement to treat all information as confidential, and, further, that such information could only be disclosed to persons or authorities, including courts and administrative bodies in the jurisdiction of the contracting party.

218. Furthermore, the ATO was obviously aware of s.21(1) of the TIA Law, which reads:

> *"The requesting party shall not, without the prior written consent of the Authority, transmit or use information or evidence provided under this law for purposes, investigations or proceedings other than those stated in the Request."*

219. Section 21(2) of the TIA Law reads:

> "*Before the Authority (the Respondent) gives consent under ss.(1) in relation to testimony provided or an order issued under s.8, the Authority shall apply to a Judge for directions.*"

220. Documents listed attached to the third Request related to confidential documents between 2003 and 2009.

221. I find that the Respondent should not have provided its consent without first applying to the Grand Court for directions pursuant to s.21(1) of the TIA Law, and, therefore, its Decision pursuant to the third Request is *ultra vires*.

222. Furthermore, and as a direct result of the Respondent's *ultra vires* consent, the ATO's use of the information in the United Kingdom was a contravention of Articles 1 and 8 of the Tax Information Agreement.

223. In relation to the third Decision I find that the Applicants' rights under Articles 9 and 7 of the Bill of Rights were infringed.

FOURTH REQUEST

224. On the 13th February 2012 the ATO sent a fourth Request to the Respondent and stated:

> *"This letter is to advise of developments in our investigation, and to request your permission to use documents you provided to us in current court proceedings concerning the Recovery and enforcement of tax claims in respect of taxable periods prior to entry into force of the Tax Information Exchange Agreement between our two governments – notwithstanding the terms of the Agreement."*

225. The ATO further stated:

> *"The Nominee Agreements you have provided are relevant to the determination, assessment and collection of taxes, the recovery and enforcement of tax claims in respect of Australian residents for taxable periods both before and after 1st July 2010."*

226. At the conclusion of this request the ATO makes three demands:

> *"(i) Notwithstanding the terms of the Tax Information Exchange Agreement entered into between our two countries, it would assist the ATO if you permit the use of the Nominee Agreements in respect of tax periods prior to 1st July 2010;*
>
> *(ii) Should this permission be granted, we also seek your permission to disclose the Nominee Agreements and associated documents to Australian courts for the purpose of defending the assessments raised in respect of tax periods prior to 1st July 2010;*

(iii) *We further seek your permission to disclose the Nominee Agreements and associated documents to Australian courts should they be required to assist in Recovery proceedings in respect of assessments raised after 1 July 2010, but for taxable periods prior to this date.*"

227. On the 17th February 2012 the Respondent replied to the ATO stating:

> "*Please be advised that I have no objection to the disclosure of the information to the Australian courts for the purposes identified in your letter, referred to above.*"

228. I find that the Respondent is in breach of the TIA Law. It had no legal authority to provide the ATO with its consent to use the material in court proceedings without first applying to a judge of the Grand Court for directions.

229. Furthermore, the Respondent was in breach of s.21 of the TIA Law and the Tax Information Agreement by consenting to the ATO for the use of documents for taxable periods prior to the 1st July 2010. It is clear from the Tax Information Agreement that it does not apply to taxable periods on or before the 1st July 2010, and it must have been clear to the ATO when it asked the Respondent for this consent. In these circumstances, the Respondent's consent was *ultra vires*.

230. In relation to the fourth Decision I find that the Applicants' rights under Articles 9 and 7 of the Bill of Rights were infringed.

GRAND COURT - CAYMAN ISLANDS

SECTION 17 NOTICE

231. I find that the Applicants are the subjects of all four Requests in a matter which is not a criminal matter or an alleged criminal matter, and, further, I find that the Applicants' "whereabouts or address" is well known to the Respondent. Accordingly, it was incumbent upon the Respondent to serve Notices to the Applicants of the existence of all four Requests – specifying "*that person, the jurisdiction making the Request, and the general nature of the information sought.*"

232. The Applicants would then have had the opportunity and the right to make written submissions to the Respondent within 15 days from receipt of the Notice – specifying any grounds which they wished the Respondent to consider in making its determination as to whether or not the Requests were in compliance with the provisions of the relevant schedule Agreement or Part IV, as the case may be, including any assertions of whether the information requested is subject to legal privilege.

233. The Applicants were denied this right and this opportunity.

234. Furthermore, in Part III, regarding the execution of Requests, s.7(1) reads:

> "*Upon receipt of a Request, and subject to s.6(2) and s.17(1), the Authority shall determine whether the Request is in compliance with the relevant scheduled Agreement or Part IV as the case may be.....*"

235. Before the Respondent could make any determination, it was incumbent upon the Respondent to serve both Applicants with s.17(1) Notices and, consequently, its failure to serve s.17(1) Notices was in breach of the TIA Law.

236. Furthermore, based on the foregoing, I find that the Respondent's failure to serve s.17 Notices infringed the Applicants' rights under Articles 9 and 7 of the Bill of Rights.

CONCLUSION

237. For all the above reasons I grant the Applicants the following relief:

i. An order for Certiorari quashing the Decisions of the CITIA, collectively and or individually as the Decisions were ultra vires of the powers vested in the CITIA by the TIA Law.

ii. A declaration that the Decisions by the CITIA to comply with the first and second Requests were unlawful because the CITIA failed to apply to the Grand Court under s.8(4) of the TIA prior to issuing production notices.

iii. A declaration that the Decisions by the CITIA pursuant to the third and fourth Requests to consent to the use of the information previously obtained by the ATO was unlawful because the CITIA failed to apply to the Grand Court under s.21(2) of the TIA Law prior to giving its consent.

iv. A declaration that the Applicants were entitled to receive Notices pursuant to s.17(1) of the TIA Law and the CITIA was in breach of its obligation to provide Notices of the four Requests to the Applicants.

v. A declaration that the Applicants were entitled to attend at any hearing under s.8(4)(a) or s.21 of the TIA Law.

vi. A declaration that the information which has been produced to the ATO, and which was the subject of the third and fourth Requests, was and remains confidential to the Applicants pursuant to s.21(1) of the TIA Law.

vii. A direction that the CITIA shall forthwith write to the ATO:

a) Formally revoking its consent to the divulging of the Applicants' documents, or any part thereof, in Court proceedings in Australia, or otherwise; and

b) Seeking the ATO's undertaking that it will not divulge the Applicants' documents or any part thereof in Court proceedings in Australia or otherwise; and

c) Demanding the immediate return and/or destruction of all copies of the Applicants' documents.

viii. As costs follow the event, I order that the costs of, and incidental to this application be paid by the CITIA.

Dated this the 13th day of September 2013

Cayman Islands

Hon. Justice Quin

Honourable Mr. Justice Charles Quin
Judge of the Grand Court

Cayman Islands

Hon. Justice Quin