COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2019/CLE/gen/1020

IN THE MATTER of the Criminal Justice (International Co-operation) Act, Chapter 105

AND

IN THE MATTER of the Banks and Trust Companies Regulation Act Chapter 316

AND

IN THE MATTER of a Request for Legal Assistance from the Public Prosecutor's Office of the Canton of Geneva, Switzerland

AND

IN THE MATTER of an Application by the Competent Authority of The Bahamas ie the Attorney-General

BETWEEN

THE ATTORNEY-GENERAL

Applicant

AND

ANTONIO CLIMENT PEREZ-CELA

AND

TRIBURY OVERSEAS SA

Respondents

Before Hon. Mr. Justice Ian R. Winder

Appearances: **Kenrah Newry with Deirdre Maycock for the Applicant**

Paula Adderley for the Respondents

13 July 2020

DECISION

WINDER, J

This is the application of the Respondents seeking the discharge of a Disclosure Order made in this action on 20 January 2020.

[1.] On 16 July 2019 the Applicant commenced these proceedings under the Criminal Justice (International Co-operation) Act (CJICA) in compliance with a letter of request for legal assistance from the Public Prosecutions Office, Judicial Power, Republic and Canton of Geneva.

[2.] The Ex Parte Originating Summons, which commenced this action, on 16 July 2019 was subsequently amended on 7 October, 2019. The Originating Summons was supported by the affidavit of Tamika Davis filed on 16 July 2019. At paragraph 6 of the affidavit of Tamika Davis, the Applicant summarized the evidence in the Letter of Request as follows:

(a) Carlos Arbo Anglada worked from 1st August, 1999 to the 30th June, 2011 at Banque Vontobel SA in Geneva as a wealth manager.

(b) Between December 2012 and June 2013, Banque Vontobel SA and more than twenty clients of Carlos Arbo Anglada, who were predominantly members of the family or persons from his close circle, filed a criminal complaint against him for misappropriation, forgery of documents and/or fraud.

(c) They accused Carlos Arbo Anglada of deceiving them between 1999 and 2011, by producing forged bank statements showing inaccurate positions with respect to the real positions of their portfolios, making numerous unrequested withdrawals in cash and by ordering bank transfers debited from their accounts without their instruction and unbeknownst to them.

(d) Carlos Arbo Anglada admitted to most of the charges brought against him, when questioned.

(e) Among the transactions under investigation is a transfer, dated 11th October 2010, in the amount of EUR 1,500,000. The funds were transferred from the bank account of Majoni Corp, which is held with Banque Vontobel SA, to the bank account of Mikeda Intertrade Corp held with Clariden Leu of which Antonio Climent Perez-Cela is the economic beneficiary.

(f) Maria José Castellvi Rey, economic beneficiary of the assets deposited into the account of Majoni Corp, declared at an examination hearing, that she had not authorized the transfer of the EUR 1,500,000 and that she was totally unaware of the company Mikeda Intertrade Corp.

(g) Carlos Arbo Anglada also declared that he forged Maria José Castellvi Rey's signature on the transfer instruction.

(h) As a result, the amount of the EUR 1,500,000 credited to the account of Mikeda Intertrade Corp held with bank Clariden Leu was suspected of having a fraudulent origin.

(i) The account of Mikeda Intertrade Corp was closed on 12th May, 2011 and the assets were transferred to an account opened by Bannik Investment SA with Banque Julius Baer in Zurich, of which Antonio Climent Perez-Cela was the economic beneficiary.

(j) The Bannik Investment SA bank account was later closed on 23rd May, 2014 and the assets that were earlier deposited into this account were later transferred to account No. 7001437 in the name of Tribury Overseas SA held with ANDBANK (Bahamas) Ltd., 2nd Floor, One Montaque Place, East Bay Street, Nassau, New Providence, The Bahamas.

(k) The aforementioned account was therefore credited with up to EUR1,500,000 of assets suspected of having criminal origin.

[3.] According to the evidence of the Applicant, the identified proceeds in the accounts at ANDBANK (Bahamas) Ltd, are directly related to criminal offences being prosecuted by the Public Prosecutor's Office.

[4.] On 20 January, 2020 this Court ordered ANDBANK (Bahamas) Ltd to provide the Applicant with certain documents and account information, relative to accounts in the name of the Respondents. The Order (the Disclosure Order) also gave liberty to any person affected to make any application deemed appropriate. It is this Order which is the subject of the challenge in this application.

[5.] By Summons dated 12 March 2020 the Respondents sought an Order in the following terms:

(1) That the order of Mr. Justice Ian Winder made herein on the 20th day of January A.D., 2020 be discharged under the inherent jurisdiction of the Court on the ground of material non-disclosure AND that the Applicant failed to demonstrate that the provisions of Section 6(2) of the Criminal Justice (International Cooperation) Act had been satisfied;

(2) That execution of and all proceedings to enforce the said order be stayed under the inherent jurisdiction of the Court;
(3) That provision be made for the costs of the application;
(4) For such further relief as the Court deems just.

The Respondents' Summons is supported by the Affidavits of Valerie Laemmel-Juillard (sworn 25 May 2020) and Shahram Dini (sworn 25 June 2020). The Applicant relied upon the affidavits of Fern Bowleg dated 9 May 2020, 12 June 2020 and 7 July 2020 in defence of the application.

[6.] The Respondents' Summons seeks relief on the grounds of:

(1) material non-disclosure; and

(2) failure to meet the conditions of the CJICA to apply for an Order to give effect to a request for assistance in obtaining evidence in The Bahamas.

[7.] In respect of the assertion of material non-disclosure, the Respondents say:

3. Both the Affidavit dated July 16, 2019 and the Amended Affidavit of Tameka Davis dated October 7, 2019 state the last date of deposit, into the Account, to be May 23, 2014 (see paragraph 6(j) of July 16, 2019 Affidavit and paragraph 6(j) October 7, 2019 Affidavit). In fact, the date of the last deposit into the Account was May 23, 2012.

4. The duty of an applicant for ex parte relief to give full and frank disclosure of circumstances pertinent to the relief sought is undisputed. Failure to do so may constitute sufficient grounds to set aside relief which has been granted ex parte. Vice Chancellor Browne Wilkinson held in *Tate Access Floors Inc. v. Boswell* [1991] Ch. 512, 532:

> No rule is better established, and few more important, than the rule, "the golden rule," that a plaintiff applying for ex parte relief must disclose to the court all matters relevant to the exercise of the court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the plaintiffs, the court will discharge the ex parte order and may, to mark its displeasure, refuse the plaintiff further inter partes relief even though the circumstances would otherwise justify the grant of such relief.

...

6. For reasons which will be explained more fully below, the Respondents submit that the fact of the last date of deposit into the Account is material to the granting of the Request for assistance, and that misstatement of this fact by the Applicant is a sufficient ground to set aside the Disclosure Order. The date of the deposit was material to the prospects of the Applicant being able to satisfy the conditions of the Criminal Justice (International Co-operation) Act to obtain evidence for use outside of the jurisdiction. The Request for assistance related to an investigation into alleged money laundering; however, limitation for this offence expired on May 24, 2019 pursuant to a seven-year limitation period. The Applicant commenced these proceedings July 16, 2019. The Court ought to have been made aware of the May 23, 2012 date, and the fact that limitation had attached. The Respondents further submit that the Order ought to be set aside in the circumstances.

[8.] The crux of the Respondents' complaint was that there was a misrepresentation of the date of the last deposit into the account. They say that it was misstated as May 23, 2014 when it ought to have been May 23, 2012. The Respondents further say that this is material to the granting of assistance as a 2012 date is outside of the 7-year limitation period, rendering a prosecution for money laundering statute barred. They argue that the misstatement of this fact by the Applicant is a sufficient ground to set aside the Disclosure Order.

[9.] It is not disputed that the instruction to close the Bannik Investment SA bank account was in fact issued on 23 May 2012.

[10.] It appears however that there was no deliberate intent to mislead the Court as the prosecutor, on 29 April 2019, prior to any application to the Court, wrote to the Applicant through the Ministry of Foreign Affairs, to alert the Applicant of the error. That letter was settled as follows:

> *Madam, Sir*
> *I have the honour to refer to your letter dated 10 April 2019*
> *In attachment, you will find the documents requested, namely the instruction to close the account and to transfer the assets to Bahamas.*
> *I realized that my request is falsely referring to the 23rd of May 2014. The instruction was actually given on the 23rd of May 2012.*

I will be pleased to provide you with any further information you might wish, I already thank you for the valuable cooperation you might grant and remain. Yours Sincerely

Johan DROZ
Procureur

This letter of the Swiss prosecutor however, on the evidence, did not reach the Applicant and was in fact ultimately disclosed to the Court and the Applicant by the Respondent.

[11.] There is considerable authority governing the legal effect of an applicant's failure to be full and frank on an ex parte application. The appropriate starting point is the oft-cited dicta of ***Ralph Gibson LJ*** in the English Court of Appeal decision in ***Brink's Mat Ltd v Elcombe*** **[1988] 3 All ER 188, 192,** where he stated*:*

> In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following:
>
> (i) The duty of the applicant is to make 'a full and fair disclosure of all the material facts': see R v Kensington Income Tax Comrs, ex p Princess Edmond de Polignac [1917] 1 KB 486 at 514 per Scrutton LJ;
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> (ii) The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see the Kensington Income Tax Comrs case [1917] 1 KB 486 at 504 per Lord Cozens-Hardy MR, citing Dalglish v Jarvie (1850) 2 Mac & G 231 at 238, 42 ER 89 at 92, and Thermax Ltd v Schott Industrial Glass Ltd [1981] FSR 289 at 295 per BrowneWilkinson J.
>
> (iii) The applicant must make proper inquiries before making the application: see Bank Mellat v Nikpour [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.
>
> (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including: (a) the nature of the case which the applicant is making when he makes the application; (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the

possible effect of an Anton Piller order in Columbia Picture Industries Inc v Robinson [1986] 3 All ER 338, [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see Bank Mellat v Nikpour [1985] FSR 87 at 92– 93 per Slade LJ.

(v) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains ... an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty ... ': see Bank Mellat v Nikpour (at 91) per Donaldson LJ, citing Warrington LJ in the Kensington Income Tax Comrs case.

(vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(vii) Finally 'it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded': see Bank Mellat v Nikpour [1985] FSR 87 at 90 per Lord Denning MR. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:

> '... when the whole of the facts, including that of the original nondisclosure, are before it, [the court] may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.'(See Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc (Lavens, third party) [1988] 3 All ER 178 at 183 per Glidewell LJ.)

[12.] Regardless of whether the misrepresentation was material or not, it appears that the Applicant, the Attorney General, was unaware of the error in the letter of request as he did not receive the letter of correction which had been sent by the Swiss prosecutor.

[13.] In respect of the allegation of failing to comply with the provisions of the CJICA the Respondents submit the following in their written submissions:

...

9. The Respondents submit that the requirements of Section 6(2) have not been satisfied and therefore the Request for assistance ought to be refused. ...

...

12. In the present case, the Request states that Antonio Climent Perez-Cela is being investigated and that the offence in question was money laundering: "I inform you that I am in charge of the preliminary investigation of the procedure mentioned under the above reference, which is opened against Antonio Climent Perez-Cela, born on August 14 1962, for money laundering." The case number referenced in the Request is Case No. P/22942/2018. The Request mentions no other offence for which Antonio Climent Perez-Cela is being investigated.

13. The Affidavit of Valérie Laemmel-Juillard (paragraph 3.2.2) states that the criminal action related to the acts of transfer described in the Request expired on October 12, 2017, May 13, 2018, and May 24, 2019, and that "Mr. Antonio Climent Perez-Cela can no longer be criminally pursued in Switzerland for these facts after these dates." The June 2020 letter of the Swiss Prosecutor agrees with this opinion: "...it is true that the offence of money laundering is subject to a 7-year statute of limitations, and that, in the present proceedings, criminal proceedings in respect of this offence, only would be extinguished..." The Respondents therefore submit that the conditions of Section 6(2) of the CJICA cannot be met in these circumstances.

14. The Respondents note the Applicant's arguments contained in the Affidavit of Fern Bowleg dated June 12, 2020 which seem to suggest that other offences (besides money laundering) are the subject of the request for assistance in the Swiss criminal proceedings. The Respondents submit that this suggestion ought to be rejected...

[14.] Miss Adderley for the Respondents, submits that the Court must determine whether or not the Attorney General has met the requirements to support the Disclosure Order. Further, she submits that even if the Attorney General had met the requirements, whether it is just to allow that order to remain in place given what we now know, that the offence being investigated, of money laundering, was time-bared against the person being investigated.

[15.] There is some dispute in the evidence between the parties as to whether the prosecutor is investigating the First Respondent (as he says he is) for offences other than money laundering. They also some dispute whether and to what extent the case of Perez-Cela has been severed from that of Carlos Arbo Anglada. I am not in a position to resolve these disputes of fact and I am not persuaded that I am required to do so in this application. I do accept however that the only offence for which Letter of Request refers, and for which assistance is sought, is in relation to the offence of money laundering. I should also emphasize that the request relates to investigations not charges.

[16.] The Respondents argue that the offence in respect of the allegation of money laundering is statute barred and that the prosecutor has accepted this fact. They rely on a letter from the prosecutor dated 5 June 2020 where he stated, in response to the Affidavit of Valerie Laemmel-Juillard, that:

> While it is true that the offence of money laundering is subject to a 7-year statute of limitation and that the present proceedings, criminal proceedings in respect of this offence only, would be extinguished, Mrs. Laemmel-Juillard deliberately ignores or is unaware that the present criminal proceedings are also open for the offence of misappropriation (art. 138 SCC), fraud (art. 146 SCC), criminal mismanagement (art. 158 SCC) and forgery of a document (art. 251 SCC).

[17.] The Applicant says, in evidence, that the Respondents have misinterpreted the prosecutor's position and in fact he was merely acknowledging that the limitation would have expired if May 2012 is the date of the final act and no additional information is uncovered.

[18.] Article 98 of the Swiss Criminal Code provides:

> The limitation period begins:
> a) On the day on which the offender committed the offence;
> b) On the day on which the final act was carried out if the offence consists of a series of acts carried out at different times;
> c) On the day on which the criminal conduct ceases if the criminal conduct continues over a period of time.

[19.] According to Mrs Bowleg at paragraphs 20, 21 and 23 of her 7 July 2020 Affidavit:

> 20. That Prosecutor Endri Gega in his letter dated 5th June 2020 has acknowledged that the limitation period had expired, however, I am advised that this assertion was due to the fact that the Swiss Prosecutors lacked empirical evidence. It is this evidence that the Respondents are objecting to being shared, despite the fact that the dates commencing the limitation period have been changed twice.
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> 21. That the Affidavit of Valerie Laemmel-Juillard at 2.2.2, indicates that "The act of transfer for which Mr. Antonio Climent Perez-Cela has been charged – the transfer from the Bunerlyn account of which he as the beneficial owner to the Bunerlyn account for which his sister was the beneficial owner – took place on the 13th January 2011. The criminal action related to these acts therefore expired on the 14th January 2018 and Antonio Climent Perez-Cela cannot be criminally pursued in Switzerland for these events after this date." The Respondent here is asserting that the 13th January, 2011 was the first act.
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> ...
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> 23. That determining that the offence of money laundering had been extinguished was due principally to the Swiss Prosecutors not having records to determine otherwise, however, the Applicants were advised by letter dated the 15th March, 2019 from the Royal Bahamas Police Force, which is exhibited as Exhibit F.B. 2 in the Affidavit of Fern Bowleg dated the 12th June, 2020, that instructions were given to transfer the funds in the account of Tribury Overseas SA to countries outside The Bahamas.

[20.] Section 6(2) of the CJICA provides for the matters which the Applicant, as the Competent Authority, must take into account in considering request for assistance, these are:

> (a) that an offence under the law of the country in question has been committed or that there are reasonable grounds for suspecting that such an offence has been committed; and
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> (b) that proceedings in respect of that offence have been instituted in that country or that an investigation into that offence is being carried on in that country, he may cause an application to be made ex parte to the Supreme Court by an originating summons for an order to give effect to the request."

[21.] Having considered the evidence before me, I am satisfied, as the Applicant was, that there are reasonable grounds for suspecting that an offence under the laws of Switzerland has been committed. The unchallenged evidence shows the moneys

of a victim, Maria Jose Castellvi Rey, was unlawfully transferred out of her account and placed into the account of Mikeda Intertrade Corp which was beneficially owned by Perez-Cela. Carlos Arbo Anglada, confessed to forging the signature of his client, Maria Jose Castellvi, and making the unauthorized transfer to the bank account of Perez-Cela. The evidence revealed how the transferred funds were being channeled from one account beneficially owned by Perez-Cela to another at different financial institutions. With each of the accounts being closed after removal in May 2011 and May 2012, the moneys are traced into the account of the Second Respondent at ANDBANK Bahamas Ltd. There was also evidence in the possession of the Applicant in March 2019, of funds in the ANDBANK Bahamas account being dealt with in December 2017. This is reflected in a letter dated 15 March 2019 from the Financial Crime Unit & Anti-Corruption Branch of the Royal Bahamas Police Force. The letter stated:

> Information received from the Financial Intelligence Unit on behalf of ANDBANK (Bahamas) is that the above mentioned account #7001437 pertaining Tribuary Overseas SA of which Antonio Climent Perez-Cela was the ultimate beneficial owner is closed. The instruction to close the account was received on 4th December 2017 and the account effectively closed in their systems on the 29th December 2017.
> The following amounts were sent out of the bank via international wire transfer:- 1,346,673.74EUR and 36,442.60 USD. Both wire transfers were sent to Pershing LLC via Citibank Frankfurt for the EUROS and via The Bank of New York for the USD.

The evidence of the Respondents does not condescend to providing a position on the impact of this letter on the limitation period and maintain their interpretation of the prosecutor's letter. The Applicant submits, and I accept, that there are reasonable grounds to believe that the offence falls within Article 98(b) as there were a series of acts which constitute the money laundering scheme and that the limitation period has not as yet ended. They say that the initial offence began on 11 October 2010 and a series of transfers on 13 January 2011, 12 May 2011, 23 May 2012 and 29 December 2017 (out of ANDBANK). They say that the period should commence on 29 December 2017. There is some cogency, on the face of the Applicant's arguments that if the limitation period moved with the dealing with

the account in May 2012, it could likewise move with the dealing with the account in December 2017.

[22.] The second requirement, which the Applicant must meet, is that the request for international legal assistance must relate to an investigation into that offence which is being carried on in that country. The Letter of Request, which was received by the Applicant was dated 20 November 2018 and opens with the words:

> *I inform you that I am in charge of the preliminary investigation of the procedure mentioned under the above reference, which is opened against Antonio Climent Perez-Cela born 14 August 1962, for money laundering.*

I am reminded that there is no requirement to establish that an offence was in fact committed, by Perez-Cela, only that the assistance of The Bahamas was necessary in the investigation (See **Gesbo Enterprise Inc. v Attorney-General**, SCCivApp. No. 115 of 2015). In **Nepsis Investment, SCCivApp No. 150 of 2017** the Court of Appeal refused to allow a disclosure order, which was made on the basis of an ongoing investigation, only upon receipt of fresh evidence which revealed that the criminal investigation had been completed and there was no possible chance for an appeal. The matter in Switzerland is still being investigated and based upon the letters from the prosecutor, he continues to require this information to conclude his investigations into the Respondent.

[23.] In all the circumstances therefore I will dismiss the Respondents' Summons.

[24.] The Applicant has sought, by Summons dated 19 May 2020, to vary the Disclosure Order to reflect that ANDBANK Bahamas is currently in liquidation by substituting the name of the Official Liquidator for ANDBANK Bahamas. That application is not contentious and I therefore make the Order sought.

Dated this 23rd day of November 2020

Ian R. Winder

Justice