

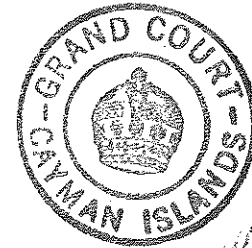
1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**  
2 **FINANCIAL SERVICES DIVISION**

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4 **CAUSE NO: FSD 47 OF 2013 (AEFJ)**

5  
6 The Hon Mr. Justice Angus Foster  
7 In Chambers  
8 Friday, 26<sup>th</sup> April 2013  
9

10  
11 **IN THE MATTER OF THE CONFIDENTIAL RELATIONSHIPS (PRESERVATION) LAW**  
12 **(2009 REVISION)**  
13

14  
15 **Appearances:** For the Applicant Ms Lucy Diggle of Mourant Ozannes  
16 No appearance for the Hon. Attorney General  
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19  
20 **EX TEMPORE RULING**  
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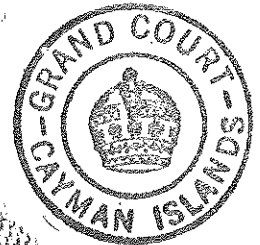
- 24 1. This is an application pursuant to section 4 of the Confidential Relationships (Preservation) Law  
25 (2009 Revision) ("CRPL") by a major British bank with its head office in London, which I shall refer  
26 to as "the Bank". The Bank is the subject of a Production Order made by a court at Kingston in  
27 England dated 5<sup>th</sup> February 2013 pursuant to English legislation known as the Proceeds of Crime Act  
28 2002 ("the Production Order").  
29
- 30 2. The CRPL applies to all confidential information with respect to business of a professional nature  
31 which arises in or is brought into the Cayman Islands and to all persons coming into possession of  
32 such information whether or not they are within the Cayman Islands (see CRPL section 3). Section 5  
33 of the CRPL makes it a criminal offence to divulge or attempt, offer or threaten to divulge or to  
34 wilfully obtain or attempt to obtain confidential information. Accordingly prima facie the Bank would  
35 be liable to criminal penalties under the CRPL if it divulged such confidential information. As a  
36 "professional person" as defined in the CRPL the relevant criminal penalties would be doubled as  
37 applied to the Bank.  
38
- 39 3. However, there are exceptions and section 4 of the CPRL, pursuant to which the Bank's present  
40 application is made, provides *inter alia* as follows:  
41

1 (1) Whenever a person intends or requires to give in evidence in, or in connection with, any  
2 proceeding being tried, inquired into or determined by any court, tribunal or other  
3 authority (whether within or without the Islands) any confidential information within the  
4 meaning of this Law, he shall before doing so apply for directions and any adjournment  
5 necessary for that purpose may be granted.

6  
7 (2) Application for directions under subsection (1) shall be made to, and be heard and  
8 determined by, a Judge of the Grand Court sitting alone and in camera. At least seven  
9 days' notice of any such application shall be given to the Attorney-General and, if the  
10 Judge so orders, to any person in the Islands who is a party to the proceedings in  
11 question. The Attorney-General may appear as amicus curiae at the hearing of any such  
12 application and any party on whom notice has been served as aforesaid shall be entitled  
13 to be heard thereon, either personally or by counsel.

14  
15 (3) Upon hearing an application under subsection (2), a Judge shall direct-

- 16 (a) that the evidence be given;  
17 (b) that the evidence shall not be given; or  
18 (c) that the evidence be given subject to conditions which he may specify whereby  
19 the confidentiality of the information is safeguarded.  
20



21 .....  
22  
23 (6) In considering what order to make under this section, a Judge shall have regard to-

- 24 (a) whether such order would operate as a denial of the rights of any person in  
25 the enforcement of a just claim;  
26 (b) any offer of compensation or indemnity made to any person desiring to  
27 enforce a claim by any person having an interest in the preservation of secrecy  
28 under this Law; and  
29 (c) in any criminal case, the requirements of the interests of justice.  
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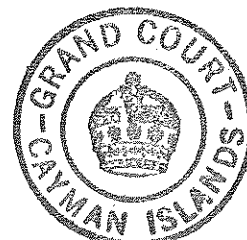
31 .....  
32  
33 4. The Production Order issued to the Bank by the English court states that it was made on the  
34 application of a named Detective Constable of the Metropolitan Police. It is very widely drawn and  
35 requires the Bank to produce to the same named Detective Constable or "other appropriate officer" of  
36 the Metropolitan Police:

1           *“all paid cheques, credit/debit slips, mandates, statements of accounts, managers notes, inter-*  
2           *account and telegraphic transfers, customer correspondence, other vouchers, customer interview*  
3           *notes and all other transaction details in relation to account [number given] and sort code [sort*  
4           *code given] and any other account(s) in which [a named individual] is a signatory to (sic) and/or*  
5           *has/had an interest for a period of 6 years prior to the date of this Order which does not consist*  
6           *of items subject to legal privilege or excluded material within fourteen (14) days from the date of*  
7           *this order”.*

8           Insofar as any such material arose in or was brought into the Cayman Islands it is clearly confidential  
9           information as defined by the CRPL. The Bank, in making the present application pursuant to Section  
10          4 of the CRPL in respect of such confidential information (which has been specified in its supporting  
11          affidavits) clearly accepts that.

12  
13          5. The Production Order states that it is an offence to prejudice a confiscation or money laundering  
14          investigation or prospective investigation by making a disclosure about it or tampering with  
15          documents relevant to the investigation. As well as directing the recipient of the Production Order not  
16          to tamper with or dispose of relevant documents, it also directs the recipient not to disclose to any  
17          other person information or any other matter which is likely to prejudice any confiscation or money  
18          laundering investigation. The Production Order provides penalties for such offences. For this reason  
19          the present application has been heard in camera, the Bank has not been named and the individual and  
20          account referred to in the Production Order have not been identified. The court file, which of course  
21          includes the evidence submitted, has also been sealed. The Production Order also specifically states  
22          that the Bank may apply to the English court concerned at any time to vary or discharge the  
23          Production Order.

24  
25          6. As I have said, the Production Order is directed to the Bank. Initially I was concerned, in light of  
26          what was said in the first affidavit filed on behalf of the Bank, that the confidential information which  
27          was the subject of the Bank’s application may in fact be information held not by the Bank itself but  
28          by a Cayman Islands subsidiary or associated entity of the Bank which was not the recipient of or  
29          subject to the Production Order. I therefore adjourned the hearing briefly part-heard to enable the  
30          Bank to clarify this. However, a further affidavit sworn and submitted on behalf of the Bank during  
31          the adjournment made it quite clear that, although the confidential documentation concerned relates  
32          to matters of a professional nature arising in this jurisdiction, the Bank itself does hold records of and  
33          relating to such matters on its own computer system in London and it is those, inter alia, which the



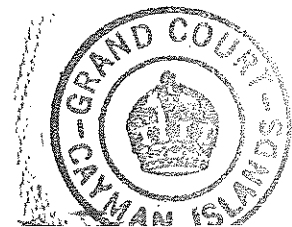
1 Bank believed fell within the terms of the Production Order and which were therefore the subject of  
2 its present application under the CRPL  
3

4 7. The application to the English court which resulted in the Production Order was, as I have said, made  
5 by a Police Officer pursuant to a particular section of the English legislation concerned, a copy of  
6 which was submitted to me. It provides that the application for a production order must state that a  
7 person specified in the application is subject to a confiscation or money laundering "investigation". It  
8 also provides that the application must state that the order is sought for purposes of the investigation.  
9 The judge who made the Production Order was clearly satisfied of these requirements. The  
10 Production Order expressly states that the judge is satisfied, having heard the application, that the  
11 requirements for making a production order are fulfilled.  
12

13 8. In the circumstances it is clear that the Production Order has been made at the request of the police on  
14 the basis of material submitted by them to the court in order to assist them in an investigation of the  
15 individual concerned in order to establish whether or not he has committed a criminal offence or  
16 offences. There was no evidence put before me that any charges have been brought, still less that  
17 there is any trial of the individual concerned.  
18

19 9. Section 4 of the CPRL expressly refers to a requirement to give the confidential information  
20 concerned in evidence in or in connection with any proceeding being tried, enquired into or  
21 determined. In the present case there is in my view no "proceeding" in respect of which the  
22 confidential information concerned is required to be given in evidence. It was suggested by counsel  
23 for the Bank that the application for the Production Order in the English court was a "proceeding" for  
24 this purpose. Reliance was placed on subsection (7) of Section 4 of the CRPL which defines  
25 "proceeding" as "*any court proceeding, civil or criminal and includes a preliminary or interlocutory*  
26 *matter leading to or arising out of a proceeding*".  
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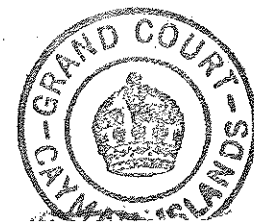
28 10. In my view the application to the English court for the Production Order by the police cannot be said  
29 to be a preliminary or interlocutory matter leading to or arising out of a proceeding as defined in  
30 Section 4 (7). It was clearly an application by the police for information held by the Bank to be  
31 produced to them for purposes of their investigations. There is no evidence that that application has or  
32 inevitably will lead to any other proceeding. The application for the Production Order having been  
33 granted, there is no longer any continuing "proceeding" before the English court. The circumstances  
34 here are materially different from those in *Re Ansbacher (Cayman) Limited [2001 CILR 214]*, to



1 which I was referred. In that case the Irish inspectors to whom the confidential information was  
2 authorised to be disclosed were *“to be viewed as having been appointed in the context of and for the*  
3 *purposes of proceedings still on-going before the Irish High Court.....the inspectors (were) acting in*  
4 *the course of proceedings which (were) before the Irish High Court.”*(see per Smellie CJ. p.241, para  
5 79).

6  
7 11. It was argued that since the Production Order specifically provides that the Bank may apply to vary or  
8 discharge the Production Order the “proceeding” before the English court is still on-going, I do not  
9 agree. The proceeding was a one-off application by the police for a Production Order and not an on-  
10 going “proceeding” but even if the application by the police for the Production Order is properly  
11 described as a “proceeding” for these purposes, the confidential information concerned is not required  
12 to be given by the Bank in evidence in or for that proceeding. The evidence given, if any, in or for  
13 that proceeding was the evidence or other material put before the English court by the Metropolitan  
14 Police in support of their application for the Production Order. The material, including the  
15 confidential information concerned, which the Bank has been ordered to produce by the Production  
16 Order is quite different and is not “evidence” for purposes of the “proceeding” before the English  
17 court which resulted in the making of the Production Order or, as far as the evidence goes, for any  
18 other current “proceeding”. The information specified in the Production Order was requested by the  
19 police to assist with their investigations, not as evidence for or in any proceeding as required by the  
20 CRPL.

21  
22 12. Furthermore, section 4 also requires that such proceeding is being tried, inquired into or determined  
23 by *“any court, tribunal or other authority”*. There is no evidence that at present anything is being  
24 tried, inquired into or determined by any court or tribunal for which or in connection with which the  
25 confidential information is required to be given in evidence. It was argued on behalf of the Bank that  
26 the phrase *“or any other authority”* is apt to cover the Metropolitan Police. In this respect I was  
27 referred again to the judgment in the *Re Ansbacher (Cayman)* case (supra). At paragraph 78 the  
28 Court accepted, following *In Re H [1996 CILR 237]*, that it had *“jurisdiction to grant directions,*  
29 *notwithstanding that the overseas authority to which the evidence was to be given was a grand jury of*  
30 *the United States which is not a court”*. It was held that the Grand Jury was to be *“regarded as*  
31 *coming within of the meaning of ‘other authority’ contemplated by”* section 4 of the CRPL. It was  
32 contended in the present case that by analogy the Metropolitan Police may be regarded as performing  
33 a similar type of function in determining whether or not a person should be charged on the basis of  
34 material acquired by them. In my opinion to suggest that section 4 of the CRPL extends to the



1 provision of confidential material to the police to assist them in their investigations is a step too far  
2 and would in effect amount to sanction of the acquisition by the police of a wide range of generalised  
3 material that is clearly confidential; in effect sanction of a "fishing expedition". That does not seem  
4 to me to be the true meaning or intent of the phrase "*other authority*" in the section, which words  
5 should be construed *ejusdem generis* with the immediately preceding words "*court*" and "*tribunal*".  
6 I do not consider that the police come within the meaning of "*other authority*" as contemplated by  
7 section 4.

8  
9 13. It was also submitted on behalf of the Bank that in the circumstances of this case, in which the Bank  
10 may be subject to penalty and also reputational damage if it did not comply with the Production  
11 Order, the exception to the seeking, divulging or obtaining of confidential information contained in  
12 Section 3(2)(b)(v) of the CRPL is applicable. That provides that the CRPL has no application to a  
13 bank "*in any proceedings, cause or matter when and to the extent to which it is reasonably necessary*  
14 *for the protection of the bank's interest, either as against its customers or as against third parties in*  
15 *respect of transactions of the bank for, or with, its customer*". It was argued that the Bank was  
16 entitled in the present circumstances to rely upon this provision because divulgence of confidential  
17 information by the Bank pursuant to the Production Order was necessary to protect the Bank's  
18 interests in not being subject to penalty or reputational damage. In *Re BCCI (Overseas) Limited (in*  
19 *liquidation)* [1994-95] *CILR* 56 Harre CJ said at page 60:

20 "*I agree with the view of Summerfield, C.J. that s.3(2)(b)(v) contemplates only proceedings,*  
21 *causes or matters to which the bank is a party...*"

22  
23 14. As I have already mentioned, it was submitted that in the present case the Bank is a party to the  
24 application which resulted in the Production Order, particularly because the Bank may apply to the  
25 Court at any time to vary or discharge the Production Order. However, I have also already expressed  
26 my view that that does not amount to the Bank being a party to that application in the sense intended  
27 by both Summerfield C.J. and Harre C.J. I do not therefore accept the proposition that in the present  
28 circumstances the CRPL does not apply to the Bank's proposed disclosure of confidential  
29 information.

30  
31 15. I accept, of course, the desirability of international co-operation and assistance and my decision is  
32 certainly not intended to indicate any disrespect for the orders of the English court. However, I must  
33 interpret and give effect to the provisions of the relevant legislation and for the reasons which I have



1       briefly recorded in this ex tempore ruling I have concluded that I should refuse the present application  
2       for directions under section 4 of the CRPL in the circumstances of this case.

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5       Dated 26<sup>th</sup> April 2013

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10       **The Hon. Mr. Justice Angus Foster**  
11       **JUDGE OF THE GRAND COURT**

