**IN THE GRAND COURT OF THE CAYMAN ISLANDS**

**CAUSE NO: G255 OF 2022**

**IN THE MATTER OF THE MUTUAL LEGAL ASSISTANCE (UNITED STATES OF AMERICA) ACT (2015 REVISION)**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO SEEK JUDICIAL REVIEW**

**CAUSE NO: G49 OF 2023**

**IN THE MATTER OF THE MUTUAL LEGAL ASSISTANCE (UNITED STATES OF AMERICA) ACT (2015 REVISION)**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO SEEK JUDICIAL REVIEW**

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| **Before:** | The Hon. Justice Kawaley (in Chambers) |
| **Appearances:** | |
| | Mr Luke Burgess-Shannon, Mourant Ozannes (Cayman) LLP, on behalf of the Applicant |
| | Ms Toyin Salako, Office of the Director of Public Prosecutions, on behalf of the Cayman Mutual Legal Assistance Authority "Cayman Authority"/ "Respondent" |
| **Heard:** | 16 October 2023 |
| **Draft Ruling circulated:** | 18 October 2023 |
| **Ruling Delivered:** | 20 October 2022 |

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*Costs of judicial review applications-whether standard costs rules displaced by provisions of mutual legal assistance regime- presumption against repeal by implication-Mutual Legal Assistance (United States of America) Act (2015 Revision), section 14, Treaty Article 6-Grand Court Rules (2023 Revision), Order 62 rule 4*

**COSTS RULING**

**Background**

1. The Applicant was granted separate leave to seek judicial review in late 2022 and early 2023 in relation to two versions of what was essentially one Notice to Produce issued under the Mutual Legal Assistance (United States of America) Act (2015 Revision) (the "Act"). The first Notice to Produce was not pursued, and those proceedings were stayed. The second Notice to Produce was issued. This was partially complied with according to its terms. It was ultimately determined that no further compliance on the Applicant's part was required.

2. After seeking to settle the payment of the Applicant's costs of compliance with the second Notice to Produce and the costs of the two sets of judicial review proceedings consensually, by Summonses dated 15 August 2023, the Applicant applied for each proceeding to be dismissed and for the Respondent to pay its costs to be taxed, if not agreed, on the standard basis. The Respondent raised two grounds of opposition, the first of which was a novel and important point that does not appear to have been determined following adversarial argument:

    (a) did the statutory scheme of the Act (in particular section 14 and Article 6 of the Treaty) displace the usual Grand Court Rules as to costs when civil proceedings were commenced in connection with a request made under the Act?

    (b) if it did not, was the Applicant entitled to recover its costs?

3. Although it seemed clear that the first question ought to be answered in the negative and the second in the affirmative, I reserved judgment to consider the implications for the first question of two authorities which were referred to in the course of argument but which were not before the Court. Each previous decision confirmed my strong provisional view that the normal costs rules applied.

**The usual costs rules in judicial proceedings**

4. It seems appropriate to deal with the usual costs rules first as it sheds some light on how the statutory provisions said to exclude them ought to be construed. Mr Burgess-Shannon for the Applicant relied on this Court's recent decision in *Maples Corporate Services Limited and Maples FS Limited-v- Cayman Islands Monetary Authority*, GC 20 of 2021, Judgment dated 5 June 2023 (unreported). Rejecting the proposition that a special rule operated in favour of public authorities, I held:

> "*16. Whatever the position may have been at the end of the last century, this Court's costs jurisdiction in adversarial civil proceedings is today (almost) exhaustively circumscribed by the principles set out in GCR Order 62 rule 4 (2).*
>
> *17. Nothing in the circumstances of the present case justifies departing from the overriding objective of GCR Order 62, namely "that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by successful party in conducting that proceeding in an economical, expeditious and proper manner". That this is the ordinary rule in judicial review proceedings was confirmed by Smellie CJ (as then was) in Roulstone-v-Cabinet of the Cayman Islands and others [2020] 1 CILR 224 (at paragraph 6).*"

5. Assuming these standard costs rules applied, it was clear that the Applicant was the successful party in costs terms as regards both proceedings. Firstly, as regards G 255 of 2022, the Applicant applied for judicial review after the Notice to Produce was served and the proceedings were stayed and that the Notice to Produce was not further pursued. As regards G 49 of 2023 and the second Notice to Produce, the Applicant complied with paragraph 2 but challenged the breadth of paragraph 1 which it stated it could not comply with. Mourant on 17 February 20, 2023, wrote the DPP on behalf of the Authority a letter which concluded as follows:

> "*In the absence of confirmation that* [the Applicant] *has now properly complied with the Production Order* [ie the Notice to Produce], [the Applicant] *remains at risk of criminal sanctions. In the event that you are unable to provide confirmation by close of business on Friday, 24 February 2023,* [the Applicant] *will be left with no other choice but to apply for*

*Judicial Review of the Production Order* [ie the Notice to Produce]*, to protect their interests. However, we hope that will not be necessary.*"

6. The confirmation sought was not forthcoming within the deadline specified, nor was any request to extend the confirmation deadline seemingly made. The proceedings were commenced and it was thereafter confirmed that the United States Government was satisfied with the extent of compliance which had occurred. This was, as I observed in the course of the hearing, a "bog standard" letter before action in civil litigation. It would doubtless have generated a different response if it had been appreciated that the present proceedings were proceedings to which the usual costs rules applied. It is easy to understand why, in light of the arguments advanced at the hearing, what I consider to be the correct legal position was not appreciated by counsel for the Respondent.

**Are the usual costs rules displaced by the Act and the Treaty?**

**The statutory provisions**

7. Ms Salako correctly submitted that the general purpose of the Act is that the requesting State under the Treaty should pay for the costs of complying with Notices to Produce issued pursuant to their requests. She pointed out that this was consistent with the statutory scheme which essentially obliged the Cayman Authority to comply with a request. Section 14 provides:

"***Claims for expenses and costs***

*14. (1) Any person in the Islands claiming to be entitled under Article 6 to be reimbursed by the United States Authority in respect of any expenses incurred shall submit his claim to the Cayman Authority for transmission to the United States Authority.*

*(2) The Cayman Authority shall have power to tax or make any enquiries to verify the details of any claim submitted under subsection (1) in similar manner to a claim for costs submitted to the Grand Court.*"

8. Article 6 provides:

"***Article 6***

***Costs***

> *1. The following expenses, and none other, incurred in executing a request shall be reimbursed by the Requesting Party upon application of the Central Authority of the Requested Party:*
> *(a) travel expenses of a witness presenting testimony in the territory of the Requesting Party;*
> *(b) fees of expert witnesses retained with the approval of the Central Authority of the Requesting Party;*
> *(c) fees of counsel appointed or retained with the approval of the Central Authority of the Requesting Party for a witness giving testimony;*
> *(d) reasonable costs of locating, reproducing, and transporting to the Central Authority of the Requesting Party documents or records specified in a request;*
> *(e) costs of stenographic reports requested by the Central Authority of the Requesting Party, other than reports prepared by a salaried government employee; and*
> *(f) reasonable costs of interpreters or translators.*
> *2. A witness who appears in the territory of the Requesting Party pursuant to Article 10 shall be entitled to the same fees and allowances ordinarily accorded to a witness in the territory of the Requesting Party.*
> *3. A witness who appears in the territory of the Requested Party pursuant to Article 8 shall be entitled to such fees and allowances as shall be agreed between the Central Authorities.*"

9. These provisions, as Mr Burgess-Shannon also correctly submitted, focus exclusively on the costs and expenses incurred in complying with a request. They do not in terms provide that the usual costs rules do not apply in any legal proceedings arising out of or relating to a request made under the Act. Ms Salako's written submissions fell short of contending that the Act by its terms ousted this Court's general costs jurisdiction. She only had the temerity to advance in oral argument what I understood to be the submission that it was clear by necessary implication that the usual costs regime did not apply.

**Repeal by implication?**

10. In my judgment it is impossible to see how these provisions can be sensibly construed as ousting, merely by implication, the statutory jurisdiction conferred on this Court in relation to costs in relation to Court proceedings. The Judicature Act provides:

"*24. (1) Subject to the provisions of this or any other Law and to rules of court, the costs of and incidental to all civil proceedings in-*

*(a) the Court of Appeal; and*

*(b) the Grand Court,*

*shall be in the discretion of the relevant court.*

*(2) Without prejudice to any general power to make rules of court, such rules may make provisions for regulating matters relating to the costs of those proceedings including, in particular, the entitlement to costs, the taxation of costs, the powers of taxing officers and the powers of judges to review decisions of taxing officers.*

*(3) The court shall have full power to determine by whom and to what extent the costs are to be paid.*

*(4) In any criminal or civil proceedings, the court may disallow or (as the case may be) order the attorney-at- law or foreign lawyer concerned to meet the whole of any wasted costs or such part of them as may be determined in accordance with the rules of court.*

*(5) Costs, including wasted costs, may be awarded to or against the Crown.*

*(6) A costs certificate made by a taxing officer shall be enforceable as if it were a judgment or order of the court.*" [Emphasis added]

11. Section 24 (1) of the Judicature Act confers a broad discretion in relation to costs on this Court and the Court of Appeal. This broad discretion is subject to "*the provisions of this* or *any other* [Act] *and to rules of court*". Unless any other Act or rules of Court modify or restrict the availability of this discretion, it is an unfettered one. In my judgment it would, save perhaps in highly exceptional circumstances, be inconsistent with recognised rules of statutory construction to conclude that the discretion conferred by section 24 (1) of the Judicature Act could be taken away otherwise than by the express terms of primary legislation. As I observed in the course of the hearing in relation to GCR Order 62 rule 4 (1) ("*This rule shall have effect unless otherwise provided by any Law*"),

terms such as "*otherwise provided*" are generally understood to refer to express statutory provisions modifying the legal regime which would otherwise apply. This is because of the rule of statutory construction sometimes referred to as the presumption against repeal by implication.

12. The submission that section 14 of the Act and Article 6 of the Treaty should be construed as impliedly repealing section 24 (1) (for the purposes of proceedings relating to the later legislation) founders when these incontrovertible principles are taken into account. It is helpful in the interests of clarity to set out some comparatively modern judicial support for what the relevant rules of construction are. In *O'Byrne-v- Secretary of State for the Environment, Transport and The Regions,* articulated, *inter alia*, the following principles:

> "*22. The court will not lightly find a case of implied repeal, and the test for it is a high one. Mr Craig properly took us to two well-known statements of principle to that effect. In Seward v 'Vera Cruz' (owner) (1884) 10 App Cas 59 the Earl of Selbourne LC said, at p68:*
>
> *'Now, if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intent to do so.'*
>
> *23. In Kutner v Phillips [1891] 2 QB 267 at p 271 AL Smith J said:*
>
> *'a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together.....Unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time a repeal will not be implied and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation, or unless there is a necessary inconsistency in the two Acts standing together.'*
>
> *24. AL Smith J repeated that test in the following year in West Ham Wardens v Fourth City [1892] 1 QB 654 at p658:*
>
> *'The test of whether there has been a repeal by implication by subsequent legislation is this: are the provisions of a later Act so inconsistent or repugnant with the provisions of an earlier Act that the two cannot stand together?'*"

13. In my judgment the expenses and costs regime under the Act and the Treaty are quite plainly not so inconsistent or repugnant with the statutory provisions conferring a general discretion to award costs on this Court so that the two regimes cannot stand together. I am further satisfied that this Court's statutory jurisdiction to award costs pre-dated the enactment of the relevant provisions of the Act and Treaty. The Judicature Act as originally enacted (Act No. 11 of 1975) conferred (section 30 (3)) a discretion to award legal costs in favour of the successful party[1]. The Act was subsequently enacted as Law 16 of 1986, and apparently did not come into effect until March 1990.

14. In reality it is doubtful if the chronology really matters in a legislative context in which only one statute, the Judicature Act, expressly deals with the costs of Court proceedings at all. There is simply no discernible conflict between the two statutory regimes at all. The Judicature Act and GCR Order 62 deal with the jurisdiction to award costs in civil proceedings. Section 14 of the Act and Article 6 of the Treaty create a mechanism for parties who comply with Notices to Produce to recover their costs of so doing from the United States Government.

**Public policy, practice and the wider legislative context**

15. Ms Salako invoked public policy and recent practice in cases both under the Act and parallel mutual legal assistance regimes in support of the Authority's case that the Court had no jurisdiction to award costs. In summary, she argued:

(a) the Authority itself had no funds or staff;

(b) the statutory objectives would be seriously impaired if the local Government was required to fund the costs of requests which the local Government was expected to comply with automatically;

(c) there was no recent instance of costs being awarded against the Authority or other mutual legal assistance agencies;

[1] *McCallister-v- Santa Cruz Investment Company* [1984–85 CILR 411] at page 413.

(d) the fact that costs orders are incompatible with the mutual legal assistance context was illustrated by a Proceeds of Crime Act case, *Leach-v-DPP* [2019 (1) CILR 87] where no costs were ordered.

16. Since it was obvious that the Authority was created to act as an arm of the Executive (the Government) which ultimately could fund any costs orders, the way the Authority was constituted had no potential impact on how the legislative scheme under the Act should properly be construed. The liability to costs orders and the ability to pay costs orders are entirely distinct matters. The bare submission that the statutory purpose of the scheme would be undermined if the Authority was required to take its costs exposure into account when it received a request seemed at first blush to be a powerful one. But this sort of public policy consideration in my judgment can have no legitimate impact on construing the entirely unambiguous provisions of the Act as it now stands. It is, at best, a law reform argument.

17. I also was inclined to accept counsel's submission that based on her recent general experience, it was reasonable for any lawyer acting in the modern mutual legal assistance regime context to assume that the usual costs regime did not apply. A major dimension of legal assessments made by judges and lawyers is recent or known practical experience. My own researches have confirmed that there have seemingly been no published judgments dealing with costs under the Act within the last 30 years. Moreover, the point has never seemingly been the subject of argument. The Cayman Authority would understandably have no easily retrievable institutional memory of costs applying to litigation arising out of the present statutory regime. One has to undertake the equivalent of an archaeological dig to find a published judgment dealing with the Act which even mentions the word "costs".

18. In *Bertoli, Eisenberg and Cannistraro v. Malone (as Cayman Mutual Legal Assistance Authority)* [1990–91 CILR 58] (which I supplied to counsel after the hearing), the fact that the Court's costs jurisdiction had not been ousted does not appear to have been subject to any doubt. The appellants in that case sought declaratory relief about their right to be heard before a Notice to Produce was made through a civil writ action. Telford Georges JA concluded the leading judgment of the Cayman Islands Court of Appeal as follows (at page 80):

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

19. This decision was made on 28 November 1990, less than nine months after the Act came into effect on 30 March 1990[2] and the "*Government Legal Dept.*" is recorded as appearing for the Cayman Authority, constituted by then Chief Justice Sir Denis Malone. Of course, this case is not a binding decision on whether the costs jurisdiction has been ousted, because this point was not considered or decided. However, it is not entirely without forensic effect. The fact that the Court of Appeal awarded costs suggests that:

(a) the Government Legal Department had not from the inception of the proceedings in the Court below adopted the affirmative position that the usual costs rules did not apply. Had this occurred the Court of Appeal ought to have been aware that no costs were awarded in the Grand Court and no costs were being sought by the Authority in relation to the appeal;

(b) on a straightforward reading of the Act and Treaty, there was no basis for either party to contend that no costs order should be made; and

(c) there was no institutional knowledge within the Government Legal Department of any imperfectly expressed legislative policy underpinning the Act that the Courts' costs jurisdiction should be displaced.

20. The Privy Council on 22 April 1991 dismissed the further appeal and awarded the successful Authority its costs of the final appeal: *Bertoli et al-v-Sir Denis Malone-The Mutual Legal Assistance (United States of America) Law* [1991] UKPC 17. Again, there was no apparent controversy about the operation of the usual costs rules. In summary, there is admittedly only indirect authority for the conclusion I would in any event have reached as a matter of statutory construction; the normal costs rules do apply to civil proceedings arising out of the mutual legal assistance requests made under the Act.

21. What is the practice and procedure in parallel statutory areas? Ms Salako's reference to *Leach-v-DPP* [2019 (1) CILR 87] is instructive in that it supports the case as to what the law on costs, on one view, ought to be in mutual legal assistance context. However, understood in its statutory context, it ultimately helps to confirm that existing law in relation to proceedings in Court concerning the Act is what the Applicant contends it to be. It is true that no costs were sought or

[2] *Bertoli,* at page 64.

awarded in that case, which concerned an appeal against the refusal of Quin J to discharge a Restraint Order granted under the Proceeds of Crime Law (2016 Revision) (the "POCL"). The appeal was dismissed and no order was seemingly made in relation to costs. The POCL at that time had the following provision in relation to the costs of proceedings relating to, *inter alia*, restraint orders:

> "*198. Notwithstanding any other law or rule of court, costs shall not be awarded against the Director of Public Prosecutions* -
>
> *(a) where, under this Law or any other law-*
>
> *(i) the Director of Public Prosecutions has applied by written notice to the Grand Court for the grant or enforcement of a confiscation order;*
> *(ii) the Director of Public Prosecutions has made an application for a restraint order or related order;*
> *(iii) the Director of Public Prosecutions has made an application for an order under Part IV;*
> *(iv) the Director of Public Prosecutions, on behalf of the government of a foreign country, has made an application for an order under this Law, and the Grand Court determines that it will not make the order concerned; or*
>
> *(b) where the Grand Court has varied or discharged an order made under this Law,*
>
> *unless it is shown to the satisfaction of the Grand Court that the Director of Public Prosecutions' application in relation to the order concerned was made in bad faith or was frivolous or vexatious.*"[3] [Emphasis added]

22. This is a helpful illustration of the sort of clear language that a draftsman intending to articulate the legislative intention of displacing the normal costs rules from proceedings relating to a particular statute may be expected to use. As I observed in the course of argument, depriving civil litigants of the protection of the normal costs rules has potential implications for fundamental fair hearing rights. It is noteworthy that section 198 does not go so far as to displace this Court's costs

[3] The current provision is the seemingly unchanged section 198 of the Proceeds of Crime Act (2020 Revision).

jurisdiction altogether; it merely limits the ability of private litigants to obtain costs orders against the DPP to cases where the relevant statutory application was "*made in bad faith or was frivolous or vexatious*". If the scheme of the Act would benefit from some departure from the normal costs proceedings in the seemingly rare cases when Court proceedings arise, section 198 of the now Proceeds of Crime Act (2020 Revision) could, perhaps, serve as a useful guide. I express no view on whether this would or would not be desirable. The public policy reasons articulated by counsel for the Authority for modifying the usual costs regime in the mutual legal assistance arena are matters falling very clearly within the domain of the Executive.

23. That said, I would positively invite consideration by the Executive and/or Legislative branches of Government as to whether section 4 of the Act should be revised on the grounds that it is plainly inconsistent with the spirit (if not the letter) of the separation of powers and judicial independence constructs of the current Cayman Islands Constitution. It is very much the business of the Judicial branch of Government to uphold its autonomy as articulated in the Cayman Islands Constitution of 2009 (as subsequently amended). Section 4 of the Act provides:

> "***Cayman Mutual Legal Assistance Authority***
> *4. For the purpose of Article 2, the Cayman Mutual Legal Assistance Authority shall be the Chief Justice, who shall exercise his functions under the Treaty and this Law acting alone and in an administrative capacity, or another Judge of the Grand Court designated by the Chief Justice to act on his behalf*."

24. In advance of the hearing, I invited counsel to identify any subsisting public policy rationale for the Head of the Judicial branch of Government being tasked (in an "*administrative capacity*") by the Act with carrying out the responsibilities of the Executive under an international treaty. This position appeared to me to call for brief mention with a view to encouraging consideration of legislative reform. My own researches suggested that cases on the Act were few and far between and it was self-evident that the Chief Justice herself would never be in a position to make judicial observations of her own. The precise reasons for the statutory approach are somewhat obscure[4],

[4] The Statement of the Attorney General during the Second Reading of the Mutual Legal Assistance Bill, September 1986 is not very illuminating for present purposes. However, I am indebted to Legal Librarian Mr Victor Villarin for seemingly conjuring up this valuable legal artifact with remarkable speed after my request for assistance in locating it.

but were doubtless considered sound in 1986. They have seemingly caused no logistical problems since. This legislative approach, however, apparently has no equivalent in any of the Overseas Territories or Crown Dependencies in relation to their corresponding treaties with the United States. In most cases the Attorney General or equivalent performs this statutory role[5].

25. Pragmatism has its place, but sometimes the notion of strict adherence to abstract constitutional principles ought surely to prevail. Apart from compelling circumstances of public necessity, judicial independence should not be compromised on purely pragmatic grounds. Judicial independence under the Cayman Islands' current constitutional arrangements is on any view a far more developed construct than it was over 35 years ago. It is surely with classic understatement that Professor William Gilmore (to whom I leave the last word on this topic) described the choice of the Chief Justice as the Cayman Mutual Legal Assistance Authority as a "*somewhat unusual decision.*"[6]

**The scope of costs the Applicant can recover in relation to these proceedings**

26. It was ultimately common ground at the hearing that the costs which this Court was being asked to award fell within a comparatively narrow compass. They did not include any of the costs of compliance with the Notices to Produce. They are limited to the costs of preparing the relevant applications, obtaining the leave orders together with any other ancillary steps relating to their stay or discontinuation. The present applications obviously include the costs of the present Costs Summonses, which have been determined in the Applicant's favour and must, it seems inevitable, be awarded to the Applicant. It appears to me that the tariff of the costs recoverable in relation to the present proceedings is likely to reflect the economical way in which the hearing was contested. It is to be hoped that the present survey of this previously unexplored legal terrain will stimulate some modernising legislative enhancements to the existing statutory regime.

[5] In the case of the Turks and Caicos Islands, it is "*the Magistrate*".
[6] '*International Action against Drug Trafficking: Trends in United Kingdom Law and Practice*', 24 INT'L L. 365 (1990) at page 384 n. 131.

**Conclusion**

27. The Applicant is entitled to Orders substantially in the terms of the draft Orders submitted. However, I will hear counsel if required as to the terms of the orders and as to the costs of the Summonses.

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**THE HONOURABLE MR JUSTICE IAN RC KAWALEY**
**JUDGE OF THE GRAND COURT**