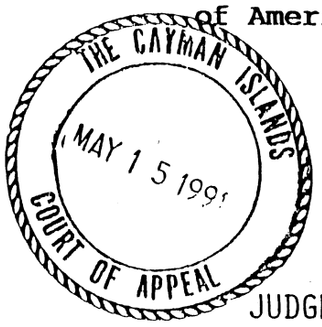
Privy Council Appeal No. 50 of 1990

(1) Richard O. Bertoli
(2) Leo M. Eisenberg and
(3) Richard S. Cannistraro *Appellants*

v.

Sir Denis Malone in his capacity as the Cayman Mutual Legal Assistance Authority pursuant to Section 4 of The Mutual Legal Assistance (United States of America) Law 1986 *Respondent*



FROM

THE COURT OF APPEAL OF THE CAYMAN ISLANDS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND APRIL 1991

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY

*[Delivered by **Lord Oliver of Aylmerton**]*

This is an appeal from a judgment of the Court of Appeal of the Cayman Islands (Zacca, Pres., Georges and Kerr JJ.A.) of 28th November 1990 dismissing with costs an appeal from a judgment of Schofield J. in the Grand Court of the Cayman Islands whereby he dismissed the appellants' claim for declaratory relief and an injunction against the respondent. The respondent is and was at the material time the Chief Justice of the Cayman Islands but is sued in his capacity as the Cayman Mutual Legal Assistance Authority constituted pursuant to section 4 of the Mutual Legal Assistance (United States of America) Law 1986. That Law, which came into effect on 30th March 1990, was enacted in order to give effect to a Treaty of Mutual Legal Assistance between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, including the Government of the Cayman Islands. The purpose of the Treaty was to enable each of the High Contracting Parties to obtain,

[17]

on request, assistance from the other in the investigation, prosecution and suppression of criminal offences by (*inter alia*) taking testimony from witnesses and providing documents, records and articles of evidence. By article 2 provision was made for the establishment within the jurisdiction of each High Contracting Party of the Central Authority by and to which requests for assistance were to be made. In the case of the Cayman Islands that authority was designated "the Cayman Mutual Legal Assistance Authority" and by section 4 of the Law it was provided that the Authority should be the Chief Justice, acting alone and in an administrative capacity, or another judge of the Grand Court designated by the Chief Justice to act on his behalf.

The appellants are United States citizens and are the defendants to an indictment currently pending before the United States District Court, District of New Jersey, where they are charged with having conducted the affairs of a brokerage firm through a pattern of criminal activity which is described as "racketeering"- a term of art in the United States denoting specific criminal conduct. In the course of the conduct of those proceedings, the United States Attorney for the District of New Jersey found it necessary to obtain evidence from persons and entities in the Cayman Islands and in November 1989 he made application in New Jersey for the issue of letters of request to the Grand Court of the Cayman Islands pursuant to the Evidence (Proceedings in other jurisdictions) (Cayman Islands) Order 1978, the legislation then governing the obtaining of evidence for use in proceedings in other jurisdictions. In response to this, the appellants issued a writ in the Grand Court, to which the United States Attorney and certain other United States Attorneys involved in the application were made defendants, seeking a declaration that they were entitled to be heard in any proceedings before the Grand Court pursuant to the letters of request and an injunction to restrain the defendants from making any application under the order of the New Jersey Court which denied them the right to challenge the application. The details of these proceedings, in which Schofield J. granted an *ex parte* interlocutory injunction on 4th January 1990, do not now matter. They are of historical significance only and are in any event fully rehearsed both in the judgment of Schofield J. and in that of Georges J.A. in the Court of Appeal. The proceedings became academic when, the Treaty having been ratified and the Law having come into force, the United States Attorney withdrew the letters of request to the Grand Court and elected to proceed instead by means of a request to the Authority under the Treaty. That request was made on 4th April 1990 and sought the production of certain documents and the depositions of a number of witnesses.

It having come to the knowledge of the appellants that notices had been issued by the Authority to persons from whom production of documents was sought, they joined both the Central Authority of the United States and the respondent as defendants to the existing writ. Subsequently, the proceedings were struck out against all defendants save the respondent and the writ was amended to claim the following relief:-

"1. That in any application or request to the Cayman Authority being made by the former defendants or any of them under the Mutual Legal Assistance (United States of America) Law of 1986 by or pursuant to a request from the Central Authority of the United States the appellants are entitled to have a legal right to be heard and oppose the application; and

2. That any steps taken or hereafter taken by the respondent to execute a Request dated 4th April 1990 by the United States Authority are and will be ultra vires of the Authority and void and of no effect."

The relief thus claimed delimits the only two issues with which their Lordships and the courts below have been concerned. As to the former Mr. Potts Q.C., who has appeared for the appellants before the Board, does not now contend that the appellants have or had any right to a hearing but has claimed that, in as much as they had made a request for an oral hearing, the respondent was bound to consider whether he should exercise a discretion in favour of or against according them such a hearing.

At the trial before Schofield J. on 11th June 1990 the Attorney General, who appeared for the respondent, maintained that, on the true construction of the Law, no hearing need be accorded nor was the Authority obliged even to consider whether a hearing should be given. That position has been maintained both before the Court of Appeal and before the Board, but the Attorney General expressed on the respondent's behalf a willingness to receive and consider any written representation which the appellants sought fit to make and such representations have in fact been received and considered.

The first issue may now, therefore, be restated thus:-

It being conceded that, contrary to the claim in the amended writ, the appellants have no right to demand a hearing, is the respondent bound, before executing a request, to consider whether, as a matter of discretion, he should give the appellants an opportunity to make oral representations?

The second issue, which arises on the second claim to relief in the amended writ, is not self-evident from the

claim. What is in fact argued is that, in relation to any information concerning the affairs of the appellants, whether in written or documentary form, within the possession or knowledge of a person in the Cayman Islands prior to 30th March 1990 when the Law came into force, the Law cannot be applied because to apply it would be to accord it a retrospective effect. That, it is said, is not contemplated by the statute and would thus be *ultra vires*.

Both the trial judge and the Court of Appeal determined both issues against the appellants and in their Lordships' judgment neither issue is seriously arguable. As regards the issue of fairness and the right to seek an oral hearing, the arguments and the authorities have been so fully and so meticulously rehearsed in the careful and instructive judgment of the Court of Appeal delivered by Georges J.A. that it would be a work of supererogation for their Lordships to repeat what was there said in different and probably less felicitous language. They are content to accept and adopt the reasoning of Georges J.A. *in toto*.

The same applies to the second issue. In relation to this, the argument was two-fold and of a transparency that scarcely merits a point-by-point refutation. First, it is said that since the Law is one for the suppression of "criminal offences of the nature ... provided in the Treaty" and since "criminal offence" is defined in the Treaty to include (*inter alia*) certain enumerated courses of conduct (such as "racketeering") which were not previously, at least in name, offences under the law of the Cayman Islands, it is demonstrable that the request referred to in both the Law and the Treaty can have reference only to evidence required in connection with "criminal offences" committed after the Law came into force. Secondly, it is submitted that in relation to any information imparted before the Law came into operation, the appellants enjoyed a vested right to have its confidentiality preserved. That was, it is conceded, subject always to the qualification that the information might have to be disclosed under compulsion of law but it is argued that, because this particular procedure for compelling disclosure was not capable of exercise until 30th March 1990, the application of the procedure to pre-existing information would constitute a retrospective impairment of vested rights which could not have been contemplated by the legislature. Reliance in this context is placed upon the judgment of the Board in *Yew Bon Tew v. Kenderaan Bas Mara* [1983] A.C. 553.

The fallacies which underlie both these arguments and the absurd results to which they lead have been convincingly demonstrated in the judgment of Georges J. and no useful purpose is served by repetition or addition. For the reasons which he so lucidly deployed both must be rejected.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondent's costs before the Board.