

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO.391 OF 2012

BETWEEN

- (1) M.H. INVESTMENTS**
- (2) J.A. INVESTMENTS LTD**
- (3) BYWATER INVESTMENTS LIMITED**



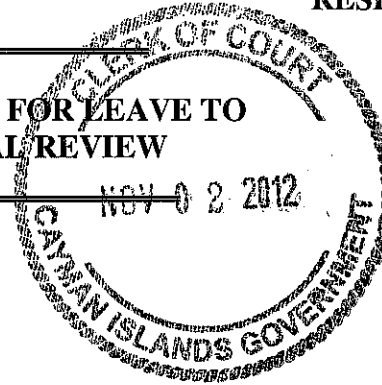
APPLICANTS

AND

- (1) CAYMAN ISLANDS TAX INFORMATION AUTHORITY**
- (2) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS**

RESPONDENTS

**AMENDED APPLICATION FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW**



TO: The Clerk of the Court
Law Courts Building
George Town
Grand Cayman

Name, address and description of applicant(s)	
	1) M. H. Investments c/o F.C.M. Ltd. P.O. Box 1982 Grand Pavilion West Bay Road Grand Cayman Cayman Islands
	2) J. A. Investments Ltd c/o F.C.M. Ltd. P.O. Box 1982 Grand Pavilion West Bay Road Grand Cayman Cayman Islands
	3) Bywater Investments Limited Mossack Fonseca & Co. (Bahamas) Limited Suite E-2, Union Court Building P. O. Box N-8188 Nassau, Bahamas

<p>Judgment, order, decision or other proceeding in respect of which relief is sought</p>	<p>The decision of the Tax Information Authority of the Cayman Islands (“CITIA”) of unknown date (the “Decision”) to accede to a request (the “Request”) by the Australian Taxation Authority (“ATO”) made pursuant to a tax information sharing 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 the documents obtained to the ATO for the purposes of judicial proceedings currently before the Australian Courts.</p>
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TAKE NOTICE that the Applicants seek the following Relief against the First Respondent, namely:

1. A declaration that the Decision was *ultra vires* of the powers granted to CITIA by the Tax Information Authority Law (2009 Revision) (the “TIA Law”);
2. An Order for Certiorari that the Decision be quashed;
3. An order that CITIA do provide the Applicants with copies of all documents held by it in any way related to the Request, including but not limited to, all correspondence between CITIA and the ATO;
- ~~3.~~ 4. Such further and other relief as this Honourable Court may deem just; and
- ~~4.~~ 5. Costs.

GROUND ON WHICH RELIEF IS SOUGHT

AND TAKE NOTICE THAT the grounds of this Application are as follows

I. Background to Relevant Legislation

1. 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.

2. 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 Section 5 thereof is CITIA.
3. By agreement dated 30 March 2010 the Governments of the Cayman Islands and Australia entered into a tax information sharing agreement (the “Australian Tax Agreement”).
4. The terms of the Australian Tax Agreement were incorporated into the law of the Cayman Islands pursuant to the Tax Information Authority (Tax Information 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 Australian Tax Agreement are incorporated as the 16th schedule to the TIA Law (“Schedule 16”).
5. Under Schedule 16 Article 5 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 the information.
6. Upon receipt of a request from the ATO, Section 7(1) of the TIA Law required CITIA to determine whether the request was in compliance with Schedule 16 and if so to execute the request in accordance with the TIA Law.
7. Under Section 8(4) of the TIA Law (as applied in the case of a request under Schedule 16):
 - 7.1. CITIA has to apply to a judge of the Grand Court for an order for production in circumstances when it considers it necessary to obtain the information specified in a request by the ATO if that information is required for proceedings or related investigations in Australia.

- 7.2. Only when the request was not being made for any proceedings or investigation could CITIA itself simply serve a notice without application to the Court.
8. A judge hearing an application by CITIA for a production order has a discretion to make an order if the conditions in Section 8(7) of the TIA Law are satisfied, including the absence of any reasonable grounds for not granting the request pursuant to the TIA Law and, in this case, Schedule 16.
9. The requirement to apply to a judge under Section 8(4)(a) is an essential safeguard for a person affected by the request for information to ensure that his rights of privacy and confidentiality are not unfairly prejudiced.
10. CITIA should inform the person affected of an application to the Grand Court in ordinary circumstances so that such person might be heard and make representations.
11. In a case where CITIA does not strictly observe the procedure for executing a request it procures an unlawful violation of the Confidential Relationships (Preservation) Law (2009 Revision) (“CRPL”) and the person producing documents is also in contravention of CRPL and without statutory authority or other protection under the TIA.

II. Background to Request by ATO pursuant to the Australian Tax Agreement

12. The Applicants MH Investments and JA Investments Ltd are companies incorporated and registered in the Cayman Islands (the “Cayman Companies”).
13. The Applicant Bywater Investments Limited is a company incorporated and registered in the Bahamas (“Bywater”).
14. Bywater and 4 other entities (the “Appellants”) are the subject of proceedings currently before the Australian Courts related to tax assessments made against them by the ATO (the “Australian Tax Proceedings”).
15. The Australian Tax Proceedings were commenced on or about 12 August 2010.
16. On or about 20 June 2012 an affidavit of the ATO filed in the Australian Tax Proceedings was served on the Appellants. This affidavit indicated that the ATO had been provided

with certain documents that belonged to, and/or contained the confidential information of, the Cayman Companies (the “Cayman Documents”).

17. The Cayman Documents were not in the public domain and the information about the Cayman Companies was plainly held in the Cayman Islands by persons, subject to duties of confidentiality and subject to the requirements of CRPL.
18. The ATO’s affidavit indicates that the Cayman Documents were “*provided to the ATO by the Cayman Islands Competent Authority*”. While there is no indication in the affidavit as to who the “*Cayman Islands Competent Authority*” is, the Applicants understand that it is CITIA and the Cayman Documents were provided pursuant to a request under the TIA Law and Schedule 16 (“the Request”).
19. Although the Cayman Companies are not parties to the Australian Tax Proceedings, they are plainly persons who were the subject of a request by the ATO under the TIA and Schedule 16 and plainly persons affected by the execution of a request by CITIA.
20. By letter dated 13 July 2012 the Cayman Companies’ attorneys, Solomon Harris, notified CITIA that the Cayman Companies understood that the Request had been made to CITIA by the ATO and that it was the Cayman Companies’ view that the Request was not in accordance with Schedule 16 on the basis that:
 - 20.1. The Australian Tax Proceedings related to the assessment of tax for periods prior to 2007 whereas article 12(b) Schedule 16 only permits the provision of information in relation to taxable periods which arise after 1 July 2010;
 - 20.2. The ATO had failed to pursue all means available on its own territory to obtain information that it sought; and
 - 20.3. As a matter of Australian law the ATO was not entitled to make a request under Schedule 16 for the purposes of obtaining evidence for use in the Australian Tax Proceedings.


21. The 13 July 2012 letter to CITIA requested that CITIA provide a copy of the Request, and give details of the basis upon which CITIA made its determination that the Request was in compliance with Schedule 16 and the TIA Law.
22. By letter dated 10 August 2012 CITIA refused to provide a copy of the Request to the Cayman Companies on the grounds that the Request was confidential pursuant to Article 8 of Schedule 16. CITIA also stated that it had certified that the Request was in compliance with Article 5 of Schedule 16 but gave no indication of the basis upon which it made that certification.
23. By letter dated 5 September 2012 the attorneys for the Cayman Companies responded to the CITIA indicating that on a true construction of Article 8 of Schedule 16 the Request was not subject to confidentiality, and also questioning the basis upon which CITIA had certified the Request as being compliant in circumstances where the information which was sought was clearly in relation to tax periods prior to 1 July 2010.
24. By letter dated 13 September 2012 CITIA responded disputing the Cayman Companies' interpretation of Article 8 of Schedule 16. CITIA also reasserted that it had certified that the Request was in compliance with Schedule 16, but again provided none of the information upon which that certification was based.

Grounds

25. From the limited information available to the Applicants it seems clear that the Request was not made in accordance with the provisions of the TIA or Schedule 16 in that:
 - 25.1. As it sought the provision of information in relation to taxable periods prior to 1 July 2010 contrary to Article 12.
 - 25.2. The request did not contain a proper description of the tax purpose of the information sought if it did not describe the tax year to which it related
26. ~~25.3~~The Applicants were not notified of the request or application to the Court in accordance with Section 8 of the TIA Law and denied a fair hearing at which they could have shown that the request did not comply with the TIA or Schedule 16.

27. ~~26.~~ In the premises the person or persons who produced the information to CITIA acted without lawful authority and in contravention of CRPL when producing the information and CITIA unlawfully procured such contravention.
28. Further or in the alternative, the production of the information was an unlawful invasion of the Applicants' rights or privacy and/or right of access to the Courts.
29. ~~27.~~In the circumstances the Applicants are entitled to a declaration that the CITIA acted *ultra vires* of the powers granted to CITIA by the TIA Law, and an order that the Decision to comply with the Request be quashed.
30. ~~28.~~The Applicants are also entitled to be provided with all documents held by CITIA relevant to this matter, including, but not limited to, the Request.
31. ~~29.~~The Applicants specifically reserve the right to add and/or amend the relief sought and/or the grounds for relief upon proper disclosure by CITIA.

DATED the 18th day of September 2012
Amended the 2nd day of November 2012



**SOLOMON HARRIS
ATTORNEYS-AT-LAW
FOR THE APPLICANTS**

THIS APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW was **FILED** by **SOLOMON HARRIS** of 3rd Floor, FirstCaribbean House, P.O. Box 1990, Grand Cayman, KY1-1104, Cayman Islands, Attorneys-at-law for and on behalf of the Applicants whose address for service is that of its said Attorneys-at-law.