

Can You Keep A Secret?

Developments in Cayman Islands Confidentiality

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Walkers works in exclusive association with Taylors in Bermuda, a full service commercial law firm providing advice on all aspects of Bermuda law.

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The Times Are A-Changing- Then...

- Confidential Relationships (Preservation) Law first enacted in 1976
- *" Countries are concerned that their tax laws may be breached by citizens who use tax haven facilities. From our point of view, the financial industry is a prominent part of the local economy and we must welcome any investor who chooses to do business in the Cayman Islands... It should be made clear that a tax offence in other countries is not an offence in the Cayman Islands. Under the CRPL...no information relating to a customer or client account with any institution within the local financial community can be divulged to anyone" (Vassel Johnson, Financial Secretary)*

...And Now

"That piece of legislation [the CRPL] has been the bane of our existence since the 1970s" (Hon. Samuel Bulgin QC, Attorney General, February 2010)

"The bill's overarching aim is to confirm, beyond doubt, that this legislation is not secrecy legislation; but rather maintains a respect for privacy whilst providing appropriate gateways to information by local competent authorities" (Hon. Wayne Panton, Minister for Financial Services, June 2016)

A Changed Playing Field

- International scrutiny
- Regulatory globalisation
- Structural changes in the offshore world
- Adapt or die!

The CIDL- Meet the New Boss, Same As the Old Boss?

- Passed on 24 June 2016 and in force since 22 July 2016
- Initially appears very similar to the CRPL, but first impressions can be deceiving
- Addresses many of the historic difficulties with the CRPL, and likely to prove a more straightforward day-to-day framework for service providers to apply.
- Change or Clarification?

What is confidential?

- *"Confidential information" includes information, arising in or brought into the Islands, concerning any property of a principal, to whom a duty of confidence is owed by the recipient of the information*
- *"Principal" means a person to whom a duty of confidence is owed*
- *"Property" includes every present, contingent and future interest or claim, direct or indirect, legal or equitable, positive or negative, in any money, money's worth, realty or personalty, movable or immovable, rights and securities thereover and all documents and things evidencing or relating thereto*

The Duty of Confidence

- The information must be of a confidential nature
- Information must be imparted or communicated to the recipient in circumstances imposing a duty of confidence
- *"I have not been able to derive any very precise idea of what test is to be applied in determining whether the circumstances import an obligation of confidence... if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence"* (Megarry J in Coco v AN Clark (Engineers) [1968] RPC 41)

The Duty of Confidence *cont.*

- *"The law now affords protection to information in respect of which there is a reasonable expectation of privacy, even in circumstances where there is no pre-existing relationship giving rise of itself to an enforceable duty of confidence"* (Eady J in Mosley v News Group Newspapers [2008] EWHC 1777)
- The Duck and the Elephant

Disclosure

- Central feature of CIDL is defining when confidential material may be disclosed.
- Key categories:
 - Ordinary course of business
 - Consent
 - RCIPS, CIMA, Financial Reporting Authority, Anti-Corruption Commission
 - Court Orders: Letters of Request and Section 4 Orders
 - Other Legislation- e.g. Tax Information Authority Law

Disclosure *cont.*

- Section 4
 - Familiar provisions from the CRPL, and existing authorities likely to still apply.
 - Obligatory whenever confidential information is required or intended to be given in evidence, unless there is consent from the principal. The Court may order
 - Evidence to be given
 - Some or all of evidence not to be given
 - Evidence be given subject to conditions: restricted circulation, in private and/or anonymisation of names, addresses and descriptions
 - Recipients fully bound by duty of confidence

Enforcement

- Under the CRPL, significant penalties, but no actual criminal prosecutions during the entire lifetime of the Law
- Criminal sanctions repealed under the CIDL
- Breach of duty of confidence gives rise to a civil action for damages and/or injunction

Enforcement *cont.*

- Defences
 - Wrongdoing
 - Serious threat to life, health and safety of a person
 - Serious threat to environment
 - Disclosure must be
 - In good faith
 - In belief that the information is true
 - In belief that the information discloses evidence of wrongdoing or a threat to life etc. or to the environment

Practical Points

- (Almost) an end to extra-territorial effect.
- Simpler than CRPL, more modern, and optically much improved, although practical impact remains to be seen.
- The end of secrecy?
- A work in progress pending finalisation of the Data Protection Bill

Tax Information Authority Requests

- Increasing trend. Unavoidable fact of professional life.
- 36 Tax Information Exchange Agreements signed, of which 29 in force. Includes many major jurisdictions, and number likely to grow
- Fundamental change to the disclosure landscape- hard evidence of increased transparency and important supplement to the disclosures permitted under the CIDL
- Specific exemption from the provisions of the CIDL (and previously the CRPL) when responding to a Notice

Key Features

- The Law itself does not give the Authority any free-standing right to obtain information
- Precise scope of powers is determined by the relevant Treaty, and all Treaties are not created equal
- Requests typically are for the provision of documents, but can also extend to taking evidence or statements, serving documents or executing searches
- No conventional right of appeal from a TIA Notice

Responding to Notices 101

- Read it
- Read it again
- Read it a third time
- Important things to note
 - Requesting jurisdiction
 - Scope of the request. What is being asked for? Do you have it? When will you have it by?
 - Due date
 - Requested format for response

Responding to Notices 101 *cont.*

- Confidentiality of Notice
- Liaison with the Authority
- Significant penalties for non-compliance or breach of confidentiality
- If in doubt- take early advice

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