SECRETS AND ISLES

Examining the changes to the Cayman Islands' confidentiality laws

BY BERNADETTE CAREY AND ROBERT LINDLEY

ABSTRACT

- *The repeal of the Cayman Islands'* Confidential Relationships (Preservation) Law (2015 Revision) *and the enactment of its replacement, the* Confidential Information Disclosure Law, 2016, *signals a new era for the jurisdiction's privacy legislation.*
- *The new statute clarifies and modernises local laws regarding the protection and disclosure of confidential information, and is consistent with the global movement towards transparency.*
- *Its scope and application are of significant importance to all trustees with a presence in the Cayman Islands.*

Concerted efforts are being made both onshore and offshore to implement stringent legislation to combat money laundering and the financing of terrorism. Unfortunately, this can confuse and worry professionals caught in the crossfire, including trustees, who find that identifying exactly what is expected of them in terms of information disclosure is, to say the least, a troublesome task.

In the Cayman Islands, many efforts have recently been made locally to comply with the cross-border information-sharing regulations now in force across the globe, and to refresh the jurisdiction's so-called 'secrecy legislation'. Alongside new laws designed to implement and supplement global initiatives such as the US *Foreign Account Tax Compliance Act* (FATCA) and the Common Reporting Standard (CRS)[1] sits

1 A detailed analysis of these two significant pieces of legislation and their implementation in the Cayman Islands is not within the scope of this article

another important law: the *Confidential Information Disclosure Law, 2016* (CIDL). The CIDL is the result of a number of careful steps taken by the Legislative Assembly of the Cayman Islands to clarify and modernise local laws regarding the protection and disclosure of confidential information, and to promote a greater degree of transparency of dealings with certain categories of such information. Importantly for trustees of Cayman Islands trusts, the CIDL also recasts the statutory protections given to confidential information in the jurisdiction, and provides helpful guidance as to the circumstances in which disclosure of confidential information will be both appropriate and necessary.

BACKGROUND TO THE LAW

The CIDL, which came into force in July 2016, repealed and replaced the *Confidential Relationships (Preservation) Law (2015 Revision)* (the Law). The Law was a relatively dated one for the jurisdiction. Enacted in the mid-1970s, it was introduced at a time when the Cayman Islands was in its infancy and yet to become the global financial hub it is today. The Law was designed to protect the confidentiality of the legitimate commercial activities and business dealings increasingly taking place in the Cayman Islands. Essentially, it applied the common-law duty of confidentiality that already existed between banks and their customers to the widest range of professional relationships dealing with confidential information across the financial services industry in the Cayman Islands. To reinforce the seriousness of the protections it offered, the Law also contained criminal sanctions for any breach of its provisions.

RELEVANCE TO TRUSTEES

For trustees, the Law had always operated as a helpful supplementary tool, alongside the *Trusts Law (2011 Revision)* (the Trusts Law) and common law, for dealing with issues concerning both the protection and disclosure of confidential information concerning a Cayman Islands trust to third parties or strangers to that trust.

In terms of general principles, the matter of disclosure of confidential information to the beneficiaries of a Cayman Islands trust is clear and consistent with English and Welsh common law: as a general rule, trustees must keep the affairs of the trust, as well as personal information relating to beneficiaries of the trust, confidential. Beneficiaries

'The matter of disclosure of confidential information to the beneficiaries of a Cayman Islands trust is clear and consistent with English and Welsh common law'

are not entitled, as of right, to disclosure of trust documents or trust information, but they may ask to inspect and take copies of essential trust documents on the basis of the proprietary right they hold over them. This right does not, however, extend to detailed information about other affairs concerning the trust (in respect of which the beneficiaries must make out a special case for access).[2] Developments in English and Welsh law on this front, including the judgments in *Schmidt* v *Rosewood Trust Ltd*[3] and *Breakspear* v *Ackland*[4] will be followed in the Cayman Islands, and each case will be judged on its own facts and merits.[5]

In recognition of its fiduciary duties to the beneficiaries of the trust in question, and if there are any concerns at all about the appropriateness of disclosure of information to beneficiaries, the trustee of a Cayman Islands trust will ordinarily apply to the Cayman Islands Grand Court under s48 of the Trusts Law for guidance and directions as to whether or not to disclose trust information. When it comes to disclosure to third parties, however, the position can be much more controversial. It is very common for trustees to receive requests from third parties for the disclosure of confidential trust information, particularly where the third party seeks that information to assist its objectives in litigation. If the information concerned a third party, and one of the exceptions to the application

2 *Re Ojjeh's Trust* [1992-93] CILR 348
3 [2003] UKPC 26
4 [2008] EWHC 220 (Ch)
5 It should be noted that the position relating to Cayman STAR trusts is different. Pursuant to s100(1) of the Trusts Law, a beneficiary of a STAR trust does not have standing to enforce the trust. Such standing is served to an enforcer pursuant to s100(2), who has the same rights as a beneficiary of an ordinary trust to be informed of the terms of the trust, to receive information concerning the trust and its administration from the trustee, and to inspect and take copies of the trust documents

of the Law did not apply, then it had also been open to the trustee to make an application to the Grand Court under s4 of the Law, discussed further below, for directions as to whether or not to disclose the confidential information in question.[6]

OPERATION OF THE 'OLD' LAW

Very wide in its scope, the Law operated to protect certain categories of confidential information that arises in or is brought into the Cayman Islands, defined to mean 'information concerning any property which the recipient thereof is not, otherwise than in the normal course of business, authorised by the principal to divulge', regardless of its origins.[7]

Sections 3 and 5 of the Law set out the key provisions concerning the information to which the Law applied, the prohibitions on disclosure and the exceptions to those prohibitions. Section 3 stated that the Law applied to all confidential information 'with respect to business of a professional nature which arises in or is brought into the Islands and to all persons coming into possession of such information at any time thereafter whether they be within the jurisdiction or thereout'.

Section 5 of the Law prohibited divulging, or attempting or threatening to divulge, confidential information; wilfully obtaining or attempting to obtain confidential information; and making use of confidential information for the benefit of any person, either clandestinely or without the consent of the person who imparted it. However, confidential information could be disclosed by certain categories of people, including professional persons acting in the normal course of business with the consent of the person who imparted the confidential information; a police officer investigating an offence; and an individual or an entity in compliance with the Law or any other Cayman Islands law.[8]

Where uncertainty as to the appropriateness or necessity of disclosure of confidential information arose in the context of litigation, and the rules and guidance found in the common law were of no assistance, s4 of the Law provided that a person intending to make the disclosure in connection with legal proceedings could apply to the Grand Court for permission to do so. The Grand Court was empowered under this section to direct whether or not the evidence comprising the confidential information was to be given (with or without protective conditions), and in doing so would consider matters such as whether the party that wished to protect the confidentiality of the subject matter had made an offer of compensation or indemnity to a party desiring to enforce the claim and, for cases involving criminal claims, the interests of justice.

The Law was explicit about how it would treat any person who divulged, threatened or attempted to divulge, or wilfully obtained any confidential information in breach of its provisions. If found guilty of such an offence, a person would be liable on conviction to imprisonment for a maximum of two years and a fine of no more than KYD5,000 (USD6,100). It is noteworthy that, despite the Law being in place for more than 40 years, no prosecution was ever pursued.

OTHER JURISDICTIONS

It is worth noting at this point that the Law was not, in modern times at least, a unique statute. In fact, it was a form of statute known globally and colloquially as a 'blocking statute', examples of which can be found in a variety of jurisdictions,

6 The Grand Court has confirmed that, where the Law applies in a matter concerning a trust, the settlor of the trust is the relevant principal capable of consenting to the disclosure of information – not the trustee. Any such consent given under duress or threat of penalty will not be accepted as valid consent or authorisation: see *Re ABC Ltd* [1984-85] CILR 130 and *In the Matter of Merrill Lynch Bank and Trust Company (Cayman) Ltd and Fiduciary Services Ltd* [2006] CILR Note 33

7 It is worth noting that 'property' was defined as 'including 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 personality, movable or immovable, rights and securities thereover and all documents and things evidencing or relating thereto'. This definition was of particular importance to trustees and beneficiaries, as a beneficiary's interest in a trust would be captured by this definition, and all trust-related documentation that evidences or relates to it is, in reliance on the Law, confidential

8 The Law, s3(2)

'The Law was explicit about how it would treat any person who divulged, threatened or attempted to divulge, or wilfully obtained any confidential information in breach of its provisions'

both onshore and offshore, and with both civil- and common-law origins. Such statutes generally have one of the two following aims:

- **to curb the encroachment of international litigation (primarily that conducted in the US) onto domestic business; or**
- **to strengthen the protection of information relating to offshore banking, trust administration or corporate structuring.**

As with the Law, these aims are generally achieved through the codification of common-law secrecy obligations, and the criminalisation of the provision of information connected to financial dealings in the relevant jurisdiction.

Examples of such legislation in force in other jurisdictions include the following:

- **The French statute known as *Law 80-538 of 16 July 16 1980*[9] operates to ensure that information provision in cross-border litigation takes place within the framework of the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition* or other similar international cooperation regimes, rather than simply being determined in the country in which the litigation was actually commenced. It also imposes criminal sanctions on parties that export certain categories of documents.**
- **The Cook Islands operates the *International Companies Act 1981–1982*. Section 227 of this Act deals with 'privacy' and confirms that it is an offence for a person to disclose to any other person information concerning the affairs of any company except as approved by the court or otherwise provided for in the Act. It also confirms that trust companies and their employees can disclose information to third parties only for the purposes of administering the trust or seeking legal advice.**
- **St Vincent and the Grenadines operates the *St Vincent Confidential Relationships Preservation (International Finance) Act, 1996* and the *International Trusts Act, 1996*, which appear to have been based entirely on the Law.**
- **St Kitts and Nevis' *Confidential Relationships Act 1985* applies to all those in the financial community, and provides that anyone disclosing banking, financial and trust documents without court order is subject to criminal penalties, including fines or imprisonment.**
- **In Panama, the *Commercial Code of the Republic of Panama* contains general provisions with regard to the confidentiality of accounting records, correspondence and other commercial documents that may be disclosed only under a court order.**

Jersey, Guernsey and the Isle of Man did not have a blocking statute in place prior to enacting data protection laws, relying instead on common-law confidentiality. Data protection legislation is becoming increasingly important in cross-border litigation, which may place a litigant in a position of conflict between foreign disclosure obligations and domestic privacy laws.[10]

'The Law commonly courted controversy and was viewed by many as greatly contributing to negative commentary about the jurisdiction'

REPEAL OF THE LAW AND COMMENCEMENT OF THE CIDL

Despite being a generally helpful tool for the preservation and controlled disclosure of sensitive and confidential information in the Cayman Islands, and not alone in the protections it offered, the Law commonly courted controversy and was viewed by many as greatly contributing to negative commentary about the jurisdiction. This was particularly so in respect of the criminal sanctions it sought to impose, on paper at least, which were frequently highlighted by detractors as a key reason for the need for greater transparency in respect of information held by offshore jurisdictions.

9 This law amends *Law 68-678*, and a full analysis of its operation and effect is analysed in James Beardsley, 'Proof of Fact in French Civil Procedure', 34 AM J COMP L 459, 460–61, 466 (1986)

10 The Cayman Islands, as part of the wider cooperation with OECD and international law enforcement, has recently passed its own data protection law. The *Data Protection Bill 2016* was passed by the Legislative Assembly of the Cayman Islands on 27 March 2017 and will shortly be assigned a commencement date

The repeal of the Law, and the enactment of the CIDL, sought to address these concerns and support the push for greater cross-border information-sharing by removing from statute any provisions imposing criminal sanctions, and by allowing for disclosure in an increased number of circumstances.

COMMENCEMENT OF THE CIDL

The CIDL was gazetted on 22 July 2016 and, in place of the Law, provides for disclosure of confidential information in a wider range of specific circumstances both without the sanction of the Grand Court and without the threat of criminal sanctions. However, in doing so, the CIDL does not shed all of its history; many of the provisions in the Law have been enshrined into the CIDL and remain in use.

Section 2 of the CIDL sets out a much shorter set of streamlined definitions. They include the following:

- **'Confidential information' is now simply defined to include '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'.**[11]
- **'Normal course of business' is a truncated version of the definition in the Law, now meaning 'the ordinary and necessary routine involved in the efficient carrying out of the instructions of a principal'.**
- **'Principal' is now simply defined to mean 'a person to whom a duty of confidence is owed'.**

As a result of these changes, it is clear that the prohibitions on disclosure in the CIDL apply only where a person actually owes a duty of confidence pursuant to common law, as opposed to operating to impose a blanket ban on disclosure, as was the case under the Law.

REPEAL OF CRIMINAL SANCTIONS

Perhaps the biggest change is that it is not a criminal offence under the CIDL to disclose confidential information. Essentially, the repeal has the effect of providing for liability for breach of confidence to now be determined, as is the case in most other common-law jurisdictions, not as a criminal matter, but within the realm of the common law and rule of equity. The ban on disseminating confidential information has therefore shifted from one of criminal liability to one of a civil duty of confidentiality.

DISCLOSURE AND WHISTLE-BLOWERS

Flowing from this, the circumstances in which disclosure can be made have also expanded. Section 3(1) of the CIDL is a more clearly articulated list of the circumstances in which disclosure is authorised and the authorities to whom confidential information can be disclosed without the risk of any civil or criminal liability. Essentially, when a duty of confidentiality arises during the course of business, the disclosure of information in the circumstances set out below shall now not constitute a breach of the duty of confidence:

- **pursuant to requests by local tax, law enforcement and financial regulatory authorities;**[12]
- **in compliance with an order or request of a Cayman Islands authority pursuant to its international obligations, such as the *Mutual Legal Assistance Treaty* with the US or the *Criminal Justice (International Cooperation) Law (2015 Revision)*;**
- **in the normal course of business or with the consent, express or implied, of a principal; and**
- **in accordance with, or pursuant to, a right or duty created by any other law or regulation of the Cayman Islands.**

The section clearly provides for disclosure pursuant to legislation enacted in the Cayman Islands since the Law came into force, including more recent laws such as the *Proceeds of Crime Law (2014 Revision)* and the *Criminal Justice (International Cooperation) Law (2015 Revision)*. These laws are collectively designed to allow for greater global transparency and information-sharing between the Cayman Islands and other jurisdictions in the context of the prevention and investigation of crimes such as money laundering and tax evasion.

The CIDL will assist in this regard too, and will enable disclosure, where the circumstances require it,[13] pursuant to CRS and US FATCA (as implemented in the Cayman Islands) – something

11 The term 'property' continues to have the same definition as under the Law and the questions regarding interpretation will likely remain

12 These authorities include the police, the Grand Court, the Cayman Islands Monetary Authority, the Financial Reporting Authority, the Director of Public Prosecutions and the Anti-Corruption Commission

13 In the trusts context, the treatment of Cayman Islands trusts under FATCA is complex. However, generally speaking, the Cayman Islands FATCA rules only apply to a trust if the trustee is a Cayman Islands entity or is an individual resident in the Cayman Islands

'CIDL provisions enable trustees to seek the court's direction where they intend to or are required to give evidence in, or in connection with, any proceeding'

that could potentially have been prohibited, at least technically, pursuant to the more limited disclosure regime operating under the Law and the case law arising from it and discussed earlier. The express provisions of the CIDL will ensure that, where there is an ongoing investigation or an inquiry by any of the listed regulatory bodies and authorities, the court's permission will not now be needed in order to disclose confidential information.

Notably, clause 3(2) of the CIDL introduces a new exemption permitting the disclosure of confidential information relating to the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, or corruption, dishonesty or serious maladministration. It also allows for disclosure of confidential information pertaining to a serious threat to the life, health or safety of a person or in relation to a serious threat to the environment. However, in all such cases, the person making the disclosure must have acted 'in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing'. This is essentially a 'whistle-blowing' defence for disclosures of confidential information made in good faith, and is therefore broadly consistent with the common-law defence of a disclosure being made in the public interest.

RETENTION OF APPLICATION FOR DIRECTIONS UNDER S4

Most helpfully for trustees, s4 of the Law has been reproduced largely intact in the CIDL. As with the Law, the CIDL contains provisions that will enable trustees, among others, to seek the court's direction where they intend to or are required to give evidence in, or in connection with, any proceeding. Helpfully, the CIDL introduces two new definitions, as follows:

- **'Give in evidence' is defined to mean making a statement, producing a document by way of discovery, answering an interrogatory, or testifying during or for the purpose of any proceeding.**
- **'Proceeding' has been defined to mean 'any court proceeding, civil or criminal, and includes a preliminary or interlocutory matter leading to or arising out of a proceeding'.**

Both definitions are consistent with the jurisprudence already in existence regarding s4 applications under the Law, which will remain relevant. In this regard, the Grand Court has previously confirmed that 'proceedings' captured by s4 include ordinary litigation in the Cayman Islands courts, civil litigation in another country, and investigations occurring under the authority and supervision of a court in a foreign country. Requests for the disclosure of confidential information in the context of investigations taking place outside the usual court processes (such as investigations by a foreign police force) fell outside of this definition under the Law and will likely continue to do so. The Grand Court also previously adopted a strong 'anti-fishing' stance with respect to the use of the Law in this context, refusing disclosure if the party requesting the information had made a very general and wide-ranging request that was obviously designed to obtain any information at all that might assist the party's case, and this approach is also expected to be maintained.

The preservation and clarification of these particular provisions is of great assistance to trustees who find themselves embroiled in litigation and subject to disclosure requests by third parties in respect of trust information. Most commonly, requests for disclosure arise in the course of matrimonial proceedings and, more specifically, during the discovery process when an aggrieved spouse wishes to find out more about what assets their estranged spouse has accumulated during the marriage. The trustee may well be asked to give a witness statement about the trust's affairs, or produce documentation concerning the trust, to the court hearing the matrimonial proceedings. Where doubt exists as to the appropriateness or necessity of disclosure of confidential information to third parties in litigation such as this, and particularly

where the 'principals'[14] do not (or, due to incapacity, cannot) consent to the disclosure, trustees can continue to seek the guidance of the Grand Court and obtain further protection from any allegations by the principals of breach of confidentiality.

There are clearly competing considerations and obligations at play and so, reflecting this, it has traditionally been the usual practice in these circumstances for trustees to make dual applications to the court: an application for orders under s4 CIDL alongside an application for directions pursuant to s48 of the Trusts Law, referred to earlier. While something of a 'belt and braces' approach, doing so will ordinarily ensure that the trustee protects and preserves (as far as possible) any confidential information imparted to it by or for the benefit of the 'principals' from attack through litigation, while at the same time ensuring that the trustee's actions in making any disclosure are at all times consistent with its duty to preserve and administer the trust property.

CONCLUSION

The world is a markedly different place than when the Law was originally enacted; it has weathered a global financial crisis, seen the gradual introduction of widespread terrorism, and witnessed exposés of organised crime and the negotiation of mutual legal assistance treaties and tax information exchange agreements. Trustees navigating this changing and challenging landscape can often find balancing their regulatory and statutory obligations with their fiduciary duties a very difficult task. The CIDL is designed to give greater clarity and guidance in this regard, and is clearly far more than a quick fix to outdated and unpopular legislation. Its enactment and provisions are consistent with a number of other measures recently taken by the Cayman Islands government to introduce a modern framework around the sharing of information, and ensure the evolution of its laws is consistent with global transparency initiatives, while at the same time clarifying and codifying the circumstances where confidentiality is to be preserved and respected. Its enactment is a welcome improvement to the laws of the Cayman Islands and undoubtedly a useful tool for trustees who find themselves caught in the crossfire between litigants with competing interests in trust property and trust information.

14 In this context, 'principals' could include the settlor, a beneficiary, or even an enforcer or protector of the trust in question

BERNADETTE CAREY TEP IS COUNSEL IN THE CAYMAN ISLANDS OFFICE OF CONYERS DILL & PEARMAN, AND ROBERT LINDLEY TEP IS COUNSEL AT CONYERS DILL & PEARMAN AND HEADS UP THE PRIVATE CLIENT AND TRUST PRACTICE FOR THE CAYMAN ISLANDS AND BRITISH VIRGIN ISLANDS OFFICES