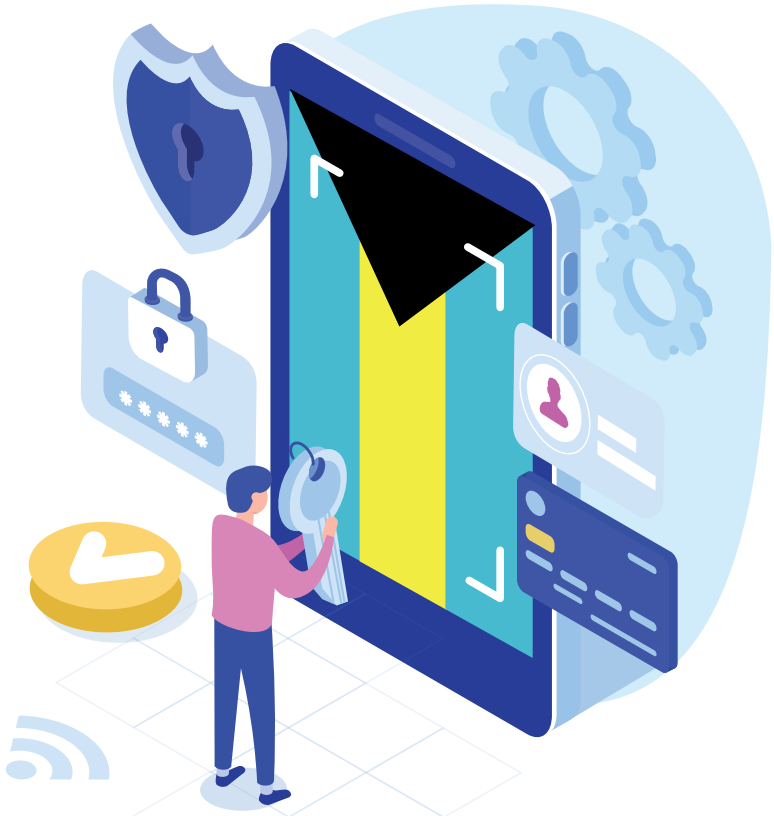

DUE PROCESS PREVAILS

TARA ARCHER-GLASGOW AND **AUDLEY D HANNA** DISCUSS THE TREND IN THE BAHAMAS FOR COOPERATION IN DISCLOSURE OF PRIVATE INFORMATION UNDER MLA TREATY/ CONVENTION LEGISLATION

KEY POINTS

WHAT IS THE ISSUE?
A person's right to banking confidentially in the Bahamas can be revoked in 2019 for the purpose of foreign court proceedings.

WHAT DOES IT MEAN FOR ME?
If a client is the person whose right to banking confidentiality is in jeopardy, for the purposes of foreign proceedings, they should take comfort in the recent ruling by the Bahamian Court of Appeal, which demonstrates that the courts will only take away such right if there is just cause to do so and due process is followed abroad.

WHAT CAN I TAKE AWAY?
If clients require mutual legal assistance, they should ensure that a letter of request is drafted properly in compliance with the laws of the jurisdiction where it will be issued. Non-parties to a foreign court action are at risk of disclosure if the legal requirements are met.

THE BAHAMAS HAS been one of a number of select jurisdictions used by high-net-worth individuals to manage their wealth, thus securing its position as one of the leading offshore financial centres. As such, the Bahamas has a constitution and banking legislation that provide for individuals to have a right to privacy in relation to their property and banking affairs. This is a basic principle that arises generally and at common law. Nonetheless, it is important to note that this right is not absolute.

The right to privacy in relation to property and banking affairs has been challenged in the context of mutual legal assistance treaties (MLA treaties) and the incorporation into Bahamian domestic law of various multinational treaties and conventions.

MLA treaties are agreements between governments that allow a requesting country to obtain information from specified entities within the receiving jurisdiction to assist with proceedings in its own courts; meanwhile, convention legislation[1] facilitates a similar objective among convention states without a specific treaty.

While such requests may extend to various forms of information, individual banking records are often key, as they are typically required in a tracing exercise and/or for the freezing and recovery of assets. While requests for judicial cooperation in relation to banking matters are not new, in particular with civil proceedings, they have evolved with respect to criminal proceedings and the worldwide shared goal of combating crime and money laundering.

As early as 2003, the Bahamian Supreme Court accepted that,[2] particularly in the context of the global concerns in relation to terrorism after 11 September 2001, a greater emphasis should be placed on providing judicial assistance to foreign countries with respect to criminal matters. Since then, a number of statutes[3] have been enacted or amended to make exceptions to the right to confidentiality where there is a suspicion of criminal activity, including tax crimes.

The Brazilian car wash scandal is an incident that highlights the growing trend to seek cooperation under MLA treaty/ convention legislation and the uncertainty about the scope of such requests in the Bahamas. What initially began as an investigation into money laundering in relation to Petrobras – the Brazilian national oil company – later became characterised as not only the largest corruption scheme in Brazil, but also in the world, as other countries became involved in an unprecedented and intricate web of political and corporate racketeering uncovered by *Operação Lava Jato* (Operation Car Wash). It is estimated

that the amount of bribes paid out as part of the corruption scheme is in excess of USD1 billion.

In 2015, the government of Brazil made a request to the government of the Bahamas for assistance in obtaining banking information about a number of individuals and entities. Arising from this request, in early 2016, pursuant to an application made under the *Criminal Justice (International Co-operation) Act 2000*, an order for disclosure was issued that required a number of local financial institutions to release all the banking records relating to these individuals and companies, including the names and identities of beneficial owners where applicable.

The scope and targets of the request and the order were unusual. In a civil context, requests for banking information must be precise, and the court will not permit a 'fishing expedition' or permit someone to use disclosure merely to establish a case. Nonetheless, in the criminal context, the court has accepted that, by its nature, the investigation of criminal conduct may require that requests for assistance be rather broad. It is usually impermissible to target for disclosure persons who are non-parties to the proceeding, and there must be a very clear reason for doing so for the court to allow an exception to be made. In the criminal context, however, non-parties are afforded less protection, as the court has adopted the view that, where criminality is concerned, as much information as possible should be provided so as to assist the foreign government.

The order for disclosure was made in early 2016 and a number of affected entities and persons sought to challenge the order, in both substance and scope. With regard to substance, none of the parties challenging the order were named as respondents in the local action, as none were accused of any actual wrongdoing in the letter of request. Rather, these entities had merely conducted a very small number of transactions (in all cases fewer than three) with companies indirectly affiliated with one of the respondents. Therefore, each of these entities was a 'non-party', and not accused of any crime. As to scope, the Brazilian request quite broadly sought disclosure of all of the banking records of these entities since the inception of the relevant accounts. This was despite the fact that all the accounts had been operating for many years prior to the transactions giving rise to the Brazilian request with no evidence of any previous connection with any of the named respondents or any illegality.

While the challenge to the order by the non-parties yielded a partially positive result in the permitted scope, with the judge using a 'blue pencil' and significantly restricting the category of information that the banks were required to disclose, the court declined to set the order aside on substantive grounds. Accordingly, the court held that judicial assistance in criminal matters required the utmost degree of cooperation, even where it related to non-parties and where there was a limited connection between the non-parties and the actual persons being investigated.

On the basis that the revised disclosure order remained too expansive, the ruling was appealed to the Bahamian Court of Appeal.

In a unanimous ruling made on 17 October 2018 (the ruling), the Bahamian Court of Appeal discharged the disclosure order in its entirety on the basis that the information requested was no longer necessary as the court accepted that the investigation underlying the substance of the request had concluded. Therefore, in essence, any continued request for information about the 'non-parties' to the main action would be a fishing expedition, which is still, generally, prohibited.

Prior to the ruling, there was no indication, other than ensuring that a request was properly issued, that the Bahamian court would evaluate the merits of a request for assistance. Further, while earlier cases suggested that there may be instances where the court could intervene, there were no reported cases that provided examples of relevant considerations. With the ruling, it is evident that the court will consider the continued relevance of the information being sought and will, at least to some degree, consider the scope of the request limited to the content of the letter of request. While there remain some questions as to the extent of Bahamian courts' discretion to decline to give effect to letters of request, it is clear that such discretion does remain with the court.

Further, depending on circumstances, if clients require mutual legal assistance, they should ensure that their letter of request is drafted properly in compliance with the laws of the jurisdiction where it will be issued and that it relates to current proceedings. The courts in the Bahamas remain generally cooperative with international requests once they are in the proper form. If the client, however, is the person whose right to confidentiality is being challenged unfairly, they should take comfort in the ruling, as it demonstrates that the courts in the Bahamas will not act as a rubber stamp and will take away such a right only if due process is followed and there is just cause to do so, supported by evidence and the facts of the particular case.

1 Such as the *Criminal Justice (International Co-operation) Act 2000*, which gives effect to the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*. **2** In *Attorney General of the Commonwealth of The Bahamas v Lucini* [2003] BHS J No 32 **3** Such as amendments to the *Proceeds of Crime Act 2000* and *The Bahamas and the United States of America Tax Information Exchange Agreement Act 2003*.

TARA ARCHER-GLASGOW AND **AUDLEY D HANNA**
ARE PARTNERS AT HIGGS & JOHNSON