



Cayman Litigation &
Dispute Resolution
Q2 2016 Review

Welcome to the Q2 2016 Stuarts litigation and dispute resolution review. Stuarts' litigation and dispute resolution team acts in a wide range of company, commercial and insolvency related disputes arising under Cayman Islands law. The July 2016 Quarterly Review addresses the recent Bill in respect of the Confidential Information Disclosure Law, 2016.

Disclosure of Confidential Information within the Cayman Islands' Financial Services Industry - A changing landscape.

The Government published The Confidential Information Disclosure Bill ("CIDB") on 11 May 2016 which will come into force by September 2016. In doing so, it will repeal and replace The Confidential Relationships (Preservation) Law (2015 Revision) ("CRPL") which some might say has been unfairly termed a "Secrecy Law", principally because of the fact that it criminalised the disclosure of confidential information in certain circumstances. The effect of the new proposed law is to facilitate and promote a greater degree of transparency in the disclosure of information. The focus of the new legislation is upon enabling disclosure, expanding on circumstances where disclosure without a Court Order is permitted and providing a "whistleblower" defence which was not available under the CRPL. The new law is a continuation of the multiple developments in promoting disclosure and transparency over the last decade.

We set out below a brief summary of the CRPL and then the new law to be reflected in the CIDB.

CRPL- A brief summary

The main features of the CRPL are as follows:

- **Section 3(1):** Broad application and scope: *"this Law has application 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:** provides for criminal liability in the event that a person is guilty of any one of the disclosure related offences specified, for which penalties such as fines, disgorgement of profits or even imprisonment may be given.
- **Section 3(2):** provides a number of exceptions as to when the CRPL will not apply and accordingly, when disclosure can be given without fear of criminal charges, but only after directions from the Grand Court have been obtained which permits the disclosure, **s 4(1)**.
- **Section 4:** requires any person who intends or is required to give confidential information as evidence in any proceedings (inside or outside of the Cayman Islands) to apply for directions from the Grand Court before making the said disclosure.

Any unlawful disclosure faces being met with criminal sanctions although, as is often said, there have never been any prosecutions under the CRPL.

Under the CRPL, when the Court is considering whether to permit disclosure under section 4(1), as in the case of *Re I and R [1994-1995] CLR Note 9*, *"the Court should examine the background, merits and shortcomings of the action for which the information is sought, in the light of any public policy issues raising by the Attorney General and the legal and beneficial interests of innocent third parties likely to be affected by the directions"*. It is important to note that under section 4(1), if there is not a *"proceeding being tried, inquired into or determined by any court, tribunal or other authority"*, then the Court cannot order disclosure.



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The Confidential Information Disclosure Bill (“CIDB”)

The CIDB repeals and replaces the CRPL; the most noticeable feature is that it automatically decriminalises any unauthorised disclosure. This, in itself, should go a long way to addressing how Cayman confidentiality legislation has in the past been misconstrued as “secrecy” legislation.

The meaning of “Confidential Information”

The starting point in considering the CIDB is the scope of the information to which it applies. In that respect, “confidential information” is defined as including:-

“... 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”.

It is therefore first necessary to assess whether the information in issue is subject to a “duty of confidence” and that is determined in accordance with ordinary common law principles, for example, relating to an attorney and his client and/or a banker and customer. For the CIDB to apply, there first needs to be a duty of confidence.

Circumstances where Confidential Information may be disclosed absent a Court Order

Clause 3(1) makes provision for 10 circumstances where confidential information may be disclosed by a person who owes a duty of confidentiality without that person incurring civil liability (or indeed, importantly, criminal liability, as was the position under the CRPL). The 10 circumstances listed in Section 3(1) are as follows:-

- a. in compliance with the directions of a court pursuant to Section 4;
- b. in the normal course of business or with the consent, express or implied, of a principal;
- c. to a constable of the rank of inspector or above investigating a criminal offence committed or alleged to have been committed with the Islands;
- d. in compliance with an order or search warrant made by the Central Authority pursuant to the Criminal Justice (International Cooperation) Law (2015 Revision);
- e. in compliance with an order made by the Cayman Authority pursuant to the Mutual Legal Assistance (United States of America) Law (2015 Revision);
- f. in compliance with an order for evidence made by the Grand Court pursuant to the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order, 1978 (S.I 1890/78);
- g. to the Monetary Authority, where the disclosure is made pursuant to a duty imposed under the Monetary Authority Law (2013 Revision) or regulatory laws;
- h. to the Financial Reporting Authority pursuant to a duty imposed by the Proceeds of Crime Law (2014 Revision) or Terrorism Law (2015 Revision);
- i. to the Anti-Corruption Commission pursuant to a duty imposed by the Anti-Corruption Law (2014 Revision); and
- j. in accordance with, or pursuant to, a right or duty created by any other Law or Regulation.

The new “Whistleblower” Defence and the Public Interest

Clause 3(2) provides that a person who discloses “confidential information” on “wrongdoing” or “in relation to a serious threat to life, health, safety of a person or in relation to a serious threat to the environment” shall have a defence for breach of the duty of confidentiality so long as they acted both in (a) good faith; and (b) held a reasonable belief that the information was both “substantially true” and disclosed evidence of either (a) “wrongdoing”; or (b) of a serious threat to life, health, safety of a person; or (c) of a serious threat to the environment.

Application to Court for Directions

Clause 4(2) provides that in circumstances where a person is or intends to give evidence in proceedings (which consists of or contains any “confidential information” within the meaning of the CIDB) and where the automatic exceptions within 3(1) do not apply, he or she must apply to Court for directions unless the person has been provided with the express (not implied) consent of the principal.

Subsections 3 to 9 of Clause 4 of the CIDB, contain further procedural guidance and requirements when applying to the Court for directions, the considerations that the Court must have regard to and options available for the Judge when making the appropriate Order, such as methods to protect against the wider use of the evidence/confidential information.



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Of specific interest is **Clause 4 (9)** which states that *“in considering what order to make under this section, a judge shall have regard to:*

- a. whether the order would operate as a denial of the rights of any person in the enforcement of a claim;*
- b. any offer of compensation or indemnity made to any person desiring to enforce a claim by any person having an interest in the preservation of confidentiality; and*
- c. in any criminal case, the requirements of the interests of justice”.*

Conclusion: A Change on the Horizon

The Minister for Financial Services, Mr. Wayne Panton has stated that: *“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”.*

The main effect in practice is that, where there is an ongoing investigation or an enquiry by any of the listed regulatory bodies and authorities, or an official request is made which is permitted under statute; the Court’s permission will not need to be sought in order to disclose confidential information falling within the scope of the CIDB. The person who holds the confidential information can give the requested disclosure without the risk of any criminal or civil liability.

However, it must still be noted that in any private dispute, in any jurisdiction, it will remain necessary for any person who intends to give evidence which, in doing so, would disclose confidential information, to apply to the Grand Court for directions. The Court’s permission would still be required to give disclosure and to absolve themselves of any civil liability for what may otherwise constitute a breach of confidentiality and/or other breaches. The introduction of the “appropriate gateways” is to assist in the prevention of crimes such as money laundering, but also to facilitate other jurisdictions such as the United States in combating unlawful tax evasion, see Clause 3(1)(e).

The removal of the criminal sanctions in the old CRPL is probably uniformly accepted as long overdue and a constructive move in facilitating transparency as indeed is the new “whistleblower” defence, the CIDB thereby being a positive development in terms of Cayman confidentiality law.

This publication is for general guidance and is not intended to be a substitute for specific legal advice. Advice should be sought about specific circumstances. This review relates to Cayman Islands law only as at 1 July 2016. If you would like further information please contact Richard Annette of Stuarts Humphries.



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