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The Confidential Relationships (Preservation) Law: Confidentiality Legislation in the Cayman Islands

In this guide Harneys considers the scope of the Cayman Islands' Confidential Relationships (Preservation) Law and the sanctions that apply to contraventions of it.

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In the Cayman Islands the preservation of confidentiality has been viewed as sufficiently important that it has been made a criminal offence to make use of, divulge, obtain or attempt to divulge or obtain confidential information.

The Cayman Islands government considers the preservation of confidentiality in legitimate business dealings to be of such importance that a duty of confidence has been imposed by statute on certain categories of person in the Cayman Islands and it has been made a criminal offence to make use of, divulge, obtain or attempt to divulge or obtain confidential information. These offences, together with a number of gateways through which confidential information may lawfully be disclosed, are set out in the Cayman Islands' Confidential Relationships (Preservation) Law (**CRPL**).

CRPL: an overview

CRPL was enacted in 1976 with the intention of protecting the confidentiality of commercial activities and protecting *bona fide* business dealings taking place in or in connection with the Cayman Islands. Effectively CRPL seeks to place on a statutory footing the common law duty of confidentiality which is owed by a bank to its customer and to extend it to other professional relationships. A breach of that duty, unless the disclosure occurs in accordance with the provisions of CRPL, is a criminal offence.

The following definitions from the CRPL are noteworthy:

Confidential Information is defined to include "information concerning any 'property' which the recipient thereof is not, otherwise than in the 'normal course of business', authorised by the 'principal' to divulge".

Property is 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".

Normal course of business is defined as "the ordinary and necessary routine involved in the efficient carrying out of the instructions of a principal including compliance with such laws and legal process as arises out of and in connection therewith and the routine exchange of information between licensees".

Principal is defined as "a person who has imparted to another confidential information in the course of the transaction of business of a professional nature".

Business of a professional nature is defined as including "... the relationship between a professional person and a principal, however the latter may be described".

Professional person includes but is not limited to "a public or government official, a bank, trust company, an attorney-at-law, an accountant, an estate agent, an insurer, a broker and every kind of commercial agent and advisor whether or not answering to the above descriptions and whether or not licensed or authorised to act in that capacity and every person subordinate to or in the employ or control of such person for the purpose of his professional activities".

What is striking about these definitions is their lack of precision and wide scope. Many of them are defined inclusively. For example, a professional person "*includes but is not limited to*" a government official, bank or trust company etc. "Business of a professional nature" is similarly defined inclusively. "Property" is defined to include everything and anything relating to it. It is clear, and the reports of proceedings in the Cayman Islands Legislative Assembly say as much, that the intention behind the law is that it should be drawn to catch the widest range of professional relationships and information relating to the financial services industry in the Cayman Islands; such lack of precision in a statute which creates criminal offences carrying stiff penalties may however be questionable.

The scope of the CRPL is set out in section 3 of the Act:

"...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."

The statute thus purports to have extra-territorial effect and applies to all confidential information brought into the islands, regardless of where such information originated.

Lawful disclosure of confidential information

Section 3(2) CPRL identifies a number of circumstances where it is not an offence to divulge confidential information. These include:

- Information given by or to a professional person acting within the normal course of business with the consent of the principal;
- Information given by or to the police investigating an offence in the Islands or, if authorised by the Governor, investigating an offence outside of the Islands which would be an offence if committed within the Islands;
- By or to certain government officials or the Cayman Islands Monetary Authority;
- By or to a bank in litigation when it is reasonably necessary for the protection of the bank's interest as against its customers or as against third parties with respect to transactions for or with its customers;

- By or to the professional person when it is necessary for the protection of that person or any other person against crime;
- Information disclosed in accordance with CRPL or "any other law";
- Information provided pursuant to directions obtained from the court under section 4 of CRPL.

Section 4 applications: providing evidence in court

CRPL allows an application to be made for directions as to whether confidential information may be given in evidence "...in, or in connection with, any proceeding being tried, inquired into or determined by a court, tribunal or other authority...". What constitutes as a qualifying proceeding under section 4 has been considered in a number of cases. Ordinary litigation in the Cayman Islands courts is of course a relevant proceeding, as is civil litigation in another country. An application responsive to a request made in the context of an investigation being conducted by a foreign police force has been held not to amount to a relevant proceeding, as has US Grand Jury proceedings. An application made that was responsive to an investigation being conducted by inspectors appointed in Ireland and acting under the authority of the Irish High Court to investigate allegations of tax evasion was held to be a qualifying proceeding.

Even where there is a relevant proceeding the court will refuse the disclosure if the party requesting the information is on a fishing expedition (that is, the party has made a generalised wide-ranging request for broad categories or all documents in a person's possession which might in some way assist the requesting party).

Section 4(1) of CRPL provides that any person who intends or is required to give evidence which contains confidential information must apply for directions from the court before doing so. For example, if a Cayman professional was required to give evidence there in litigation overseas, the professional may apply for directions whether or not to do so and if so, on what, if any, conditions.

On an application under section 4 the court may direct that the evidence to be given, that it not be given or that it be given subject to conditions designed to safeguard the confidentiality of the information. In considering what directions to give, the court is to have regard to whether the directions given would constitute a denial of the rights of any person in the enforcement of a just claim, whether a party who wishes to protect the confidentiality of the subject matter has made an offer of compensation or indemnity to a party desiring to enforce a claim; and in a criminal case the interests of justice. In considering whether a refusal to permit the disclosure of the confidential information would be to deny the right of a person in a just claim, the court has held that it should examine the background, merits and shortcomings of the case in which the disclosure is sought in the light of any public interest concerns raised and the legal and beneficial interests of innocent third parties likely to be affected by the directions. The court will also have regard to whether there is an alternative means of obtaining the information.

The court has to consider whether the directions sought invoke any questions of public policy. In previous cases the court has invoked public policy concerns when directing that information not be disclosed to a foreign government which could not give undertakings as to what future use might be made of the information which it sought; similarly, disclosure was refused where a party to foreign litigation involving an international tracing claim sought the disclosure of confidential information and wished to use that information at its discretion in any further proceedings that might be necessary in the context of its claim.

Generally where disclosure is sought in support of a just claim the Court will direct that the information be disclosed. Sometimes the balancing of interests requires conditions to be imposed. The conditions are set out in

section 4(4): the court may direct that the evidence may be given to certain named persons, or taken in camera, or that documentary evidence is anonymised.

Section 4 applications are made by way of a summons, supported by an affidavit, and sworn on behalf of the applicant which:

1. Describes the circumstances in which the applicant is to give evidence;
2. Identifies the principal of the confidential information and explains the circumstances surrounding the confidential relationship;
3. Generally states the terms the particulars of the evidence to be given and why it constitutes confidential information; and
4. Describes the reasons and scope of the principal's objection to the applicant's disclosure

The Attorney-General is given notice of all applications made under CRPL as guardian of the public interest and has a right to appear on the hearing of all such applications.

Offences

Section 5 of CRPL imposes criminal penalties on anyone who divulges or threatens, offers or attempts to divulge or wilfully obtains or attempts to obtain any confidential information. A person guilty of such an offence is liable on conviction imprisonment for a maximum of two years and a fine of no more than CI\$5,000 (US\$6,200).

The penalties are doubled where a person commits an offence for reward (whether for himself or another) or clandestinely or without the consent of the principal makes use of the information for his own benefit or the benefit of another. In addition to doubling the fine the fine may be increased by the amount of the award or may be forfeited. Any profit earned from the use of the confidential information is treated as a reward too, so the fine may be increased by the amount of the profit earned or the profit may be liable to be forfeited. Where the person committing the offence is a relevant professional person, the penalty may be redoubled.

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