

**IN THE MATTER OF A.S. CARLTON, C.A. CARLTON and  
M.F. HAMILTON**

SUPREME COURT (Pizzarello, Ag. C.J.): October 31st, 1997

*Evidence—assistance to foreign court—enforcement of foreign revenue law—obtaining of evidence for use in foreign criminal proceedings based on breach of revenue law not direct or indirect enforcement of that law*

The Attorney-General applied for an order for the examination of witnesses pursuant to a letter of request for judicial assistance from an English court.

The defendants were charged in the City of London Magistrates' Court with tax evasion offences under the English Customs and Excise Management Act 1979 and the Criminal Justice Act. The court requested that various witnesses be examined in Gibraltar, and the Chief Justice, in response to an *ex parte* application under O.70 of the Rules of the Supreme Court, appointed an examiner. The witnesses objected to the orders and the examiner applied for directions.

The witnesses submitted that they should not be called to give evidence, since the court should not assist in the enforcement of a foreign state's revenue laws. The Attorney-General submitted in reply that the court should permit the examination since the restriction applied (a) only to direct or indirect enforcement of foreign revenue laws; or alternatively (b) only to judicial assistance in aid of civil proceedings, not criminal proceedings, as these were.

**Held**, upholding the order for examination in principle:

Under the Evidence Ordinance, ss. 9 and 12, judicial assistance could be given in aid of foreign civil or criminal proceedings. Although, at common law, the court could not act so as directly or indirectly to enforce foreign revenue laws, the obtaining of evidence for use in criminal proceedings did not constitute enforcement in either sense, since it would not operate so as to give extra-territorial effect to English legislation or to afford a defence to proceedings in Gibraltar based on foreign law. Accordingly, subject to the court's approval of the scope of the request, the order for examination would be upheld (page 207, line 7 – page 209, line 7).

**Cases cited:**

- (1) *India (Govt.) v. Taylor*, [1955] A.C. 491; [1955] 1 All E.R. 292, considered.
- (2) *James v. Catherwood* (1823), 3 Dow. & Ry. K.B. 190, considered.

- (3) *Norway (State) Applications (Nos. 1 & 2), In re*, [1990] 1 A.C. 723; [1989] 1 All E.R. 745, applied.
- (4) *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, [1978] A.C. 547; [1978] 1 All E.R. 434.

**Legislation construed:**

Evidence Ordinance (1984 Edition), s.9 (as adapted by s.12):

“Where an application is made to the court for an order for evidence to be obtained in Gibraltar and the court is satisfied—

(a) that the application has been made in pursuance of a request issued by or on behalf of a court or tribunal (‘the requesting court’) exercising jurisdiction in a country or territory outside Gibraltar; and

(b) that the evidence to which the application relates is to be obtained for the purpose of criminal proceedings which have been instituted before the requesting court,

the court shall have the powers conferred on it by the following provisions of this Ordinance.”

*R. Pilley* as special examiner;

*T.G. Phillips* for the witnesses;

*K. Warwick* for the Attorney-General.

**PIZZARELLO, Ag. C.J.:** On August 17th, 1997, Schofield, C.J. made orders pursuant to a request from the City of London Magistrates’ Court on October 11th, 1996 and a further request on June 6th, 1997. The matter came before the Chief Justice *ex parte* in accordance with O.70 of the Rules of the Supreme Court, which governs these matters. Pursuant to the orders of the Chief Justice, Mr. Ray Pilley was appointed examiner. Mr. Tom Phillips of Messrs. Phillips & Co., which was one of the entities concerned under these orders, then questioned, on behalf of his firm and also Southern Belle Ltd., Sasko Ltd. and Narrowdale Ltd., the grounds on which the orders were made and their scope. The examiner, who now desires to examine the witnesses, has applied to me for directions to give effect to the letters of request on such terms as the court thinks fit.

On appearing before me on June 27th, 1997, Mr. Phillips brought to my attention the contentions contained in his letter of June 24th, 1997 to Mr. Pilley, the affidavit of Mr. Kevin Warwick from the Attorney-General’s Chambers in support of the orders and his own affidavit in reply sworn on June 30th, 1997 put to me in draft form. All parties present agreed that the bundle produced by Mr. Pilley and the affidavits produced contained all their respective arguments in regard to the substantive issue relating to revenue law.

The defendants were charged with offences contrary to s.170(2) of the Customs and Excise Management Act 1979 and s.71 of the Criminal

Justice Act 1993 at Birmingham Magistrates' Court. I am not sure what the position is with Malcolm Frank Hamilton at the moment and, pursuant to s.9(b) as read with s.12(1)(a) of the Evidence Ordinance, before any order may be made with regard to him he must have  
5 proceedings instituted against him. The offences clearly relate to offences which arise from breach of the revenue laws of England.

It is trite law that the courts of Gibraltar should not and will not entertain a suit by a foreign state to recover a tax. For these purposes, England is a foreign state. Viscount Simonds in *Government of India v. Taylor* (1) ([1955] 1 All E.R. at 296) refers to *James v. Catherwood* (2), in which Sir Charles Abbott, C.J., later Lord Tenterden, said (3 Dow. & Ry. K.B. at 191): "This point is too plain for argument. It has been settled, or at least considered as settled, ever since the time of LORD HARDWICKE, that in a British court we cannot take notice of the revenue laws of a  
10 foreign state." The explanation for the rule is set out by Lord Keith of Avonholme in the same case and I do not consider that I need go into that.

The same approach was taken by the House of Lords in *In re State of Norway's Applications (Nos. 1 & 2)* (3). Here there was a long investigation as to jurisdiction and Lord Goff of Chieveley pointed to the fact that the court was concerned with the construction of certain words used in an Act of Parliament; the Evidence (Proceedings in Other Jurisdictions) Act 1975—which is primarily concerned with conferring jurisdiction on courts in the United Kingdom (in England the High Court) to obtain evidence pursuant to a request from a court or tribunal outside  
15 the jurisdiction of the court (whether elsewhere in the United Kingdom or abroad)—and quoted Lord Wilberforce in *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.* (4) ([1978 A.C. at 608): "The 1975 Act is, as I think, clear in its terms so that reference in aid of interpretation to previous statutes is not required."

I would add here that a consideration of conventions and any historical differences between England and Gibraltar is equally irrelevant to this application. Now, I do not like to refer to speeches from other cases which are taken out of context, as I apprehend I have done, but the references I have used reflect what I believe to be the position in  
20 Gibraltar.

The Evidence Ordinance, Part II is the equivalent, as far as is relevant, of the 1975 Act. I disagree with Mr. Phillips when he avers that the Act has never been enacted in Gibraltar (see the marginal reference in the Ordinance to "1975 (c.34), s.9") and I should say that the 1970  
25 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters also applies to Gibraltar.

The point that has to be borne in mind is that while the two cases I have referred to dealt with civil matters, the instant matter is a criminal matter. Nevertheless the Act and the Ordinance provide for the courts to have  
30 jurisdiction to assist courts in other countries by obtaining evidence in

criminal proceedings. Lord Goff in *In re State of Norway's Applications (Nos. 1 & 2)* (3) ([1989] 1 All E.R. at 760) refers to Dicey & Morris, *The Conflict of Laws*, 11th ed., Rule 3, at 100 (1987): “English courts have no jurisdiction to entertain an action: (1) for the enforcement, either directly or indirectly, of penal, revenue or other public law of a foreign State; or (2) founded upon an act of State.” He continues (*ibid.*):

“At all events the rule cannot, in my view, go to the jurisdiction of the English court. What the English court does is simply to decline in such cases to exercise its jurisdiction, and on that basis the relevant proceedings will be either struck out or dismissed.”

Thus, given that the jurisdiction is unqualified, the Gibraltar court, like its English counterpart, should decline to exercise that jurisdiction in the case of a letter of request in relation to criminal proceedings concerned with the enforcement of the revenue law of the requesting state. In the *Government of India* case (1) the rule was limited to cases of direct or indirect enforcement in England of the revenue law of a foreign state. The difference is that that related to a civil matter, but it is plain here that this is not a direct enforcement of the revenue laws of England and I quote Lord Goff in *In re State of Norway's Applications (Nos. 1 & 2)* (*ibid.*, at 761–762):

“Is it concerned with their indirect enforcement? I do not think so. It is stated in *Dicey and Morris* p.103 that indirect enforcement occurs (1) where the foreign state (or its nominee) in form seeks a remedy which in substance is designed to give the foreign law extra-territorial effect or (2) where a private party raises a defence based on the foreign law in order to vindicate or assert the right of the foreign state. I have been unable to discover any case of indirect enforcement which goes beyond these two propositions. Even so, since there is no authority directly in point to guide me, I have to consider whether a case such as the present should nevertheless be held to fall foul of the rule. For my part, I cannot see that it should. I cannot see any extra-territorial exercise of sovereign authority in seeking the assistance of the courts of this country in obtaining evidence which will be used for the enforcement of the revenue laws of Norway in Norway itself. Let it be supposed, for example, that in *A-G of New Zealand v Ortiz* . . . the case was not one of New Zealand seeking to enforce its claim in this country, but of seeking the assistance of the English courts to obtain evidence to enforce its claim in New Zealand. I find it very difficult to imagine that such an application would have been refused. Nor do I consider that refusal of the application of the State of Norway in the present case could easily be reconciled with the power of the courts of this country to exercise their jurisdiction under the 1975 Act in criminal proceedings, for example, criminal proceedings in Norway in a case of tax evasion.

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It follows that I am unable to accept the submissions of the witnesses on the first two points argued by them before your Lordships' House."

So I would not set aside the order of August 17th, 1997 on these grounds.

5 I have now to turn my attention to the question whether the request is too wide and may be a fishing exercise and for that I should discuss the position further with counsel.

*Ruling accordingly.*

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