

Confidential Information Preservation v Disclosure – Any Real Change?

Summary

On 15 July 2016 the Governor of the Cayman Islands assented to the repeal of the longstanding Confidential Relationships (Preservation) Law (the “CRPL”). In this client briefing we highlight the key distinctions between the now repealed CRPL and the newly enacted Confidential Information Disclosure Law, 2016 (the “CIDL”), which are:

1. it is no longer a criminal offence to disclose confidential information; and
2. there is now a “whistle-blower” defence for those disclosing confidential information in certain circumstances.

It does, however, remain the case that those in possession of confidential information are still required to seek directions from the Grand Court for disclosure of the same if consent is not given by the client.

The Modern Era

The International Consortium of Investigative Journalists claimed that the “Panama Papers” were the largest disclosure of confidential information in history. The Anti-Corruption Summit held in London only months later, which the Cayman Islands Premier and Financial Services Minister attended, again highlighted the world’s view of offshore financial centres. As a prelude to an open information sharing agreement between the Cayman Islands and the United Kingdom, the Legislative Assembly has repealed the CRPL and replaced it with the CIDL. But, has anything, in essence, actually changed?

It is perhaps unsurprising that a lawyer would answer that question with “well, yes and no”.

The most obvious difference between the CRPL and the CIDL is that it is no longer a criminal offence to disclose confidential information. Section 5 of the CRPL made it a criminal offence to i) divulge confidential information ii) attempt, offer or threaten to divulge confidential information or iii) to wilfully obtain or attempt to obtain confidential information. The penalty for breaching section 5 was a fine of up to \$5,000 and imprisonment of up to 2 years. If a person committed the offence for a financial reward then the penalties were double, along with forfeiture of the reward and a further fine of double the reward. Given that the CRPL purported to extend

extraterritorially it was at least arguable that a disclosure of confidential information outside of this jurisdiction could or would be prosecuted within this jurisdiction.

There is no equivalent of section 5 of the CRPL in the new CIDL although as we understand it no one was ever prosecuted under section 5 of CRPL and so perhaps in reality little practical change has occurred. Without a criminal offence being provided for individuals and companies will be forced to take a breach of the duty of confidence into their own hands (and expense) by instituting proceedings in the civil courts for breach of common law and equitable rights, which they could have done in the past and regularly either did so, or threatened to do so.

The ban on disseminating confidential information has therefore shifted from one of criminal liability to one of a civil duty of confidentiality, the same as is found in the majority, if not all, common law jurisdictions.

Another key change between the CRPL and the CIDL is that the new law provides for what is commonly called a “whistle-blower” defence. Previously the disclosure of confidential information was absolutely barred except for disclosure which was necessary in the “normal course of business”, to certain regulatory bodies and the police, pursuant to a Court order for mutual legal assistance to overseas governmental agencies or by virtue of directions from the Court under section 4. Although these exceptions remain in the new CIDL there is now included at section 3(2) the “whistle-blower” defence which anyone can rely upon to an action for breach of the duty of confidence. Therefore anyone who, in good faith and in the reasonable belief that the information is substantially true, discloses 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 will now have a defence to any action against him or her. It is also interesting to note that the “whistle-blower” defence is also available for those disclosing confidential information where there is a serious threat to the life, health, or safety of a person or a serious threat to the environment. Although the statutory protection of whistle-blowers is limited in the Cayman Islands the addition of the defence to the CIDL should, in our view, be seen as a welcome development.

Importantly the CIDL preserves section 4 of the CRPL which enables a person who intends or is required to disclose confidential information in evidence in proceedings, whether it be in the Cayman Islands or elsewhere, to apply to the Court for directions as to whether, and if so how, that information should be disclosed. The most common use of this type of application for approval has historically been in relation to discovery in legal proceedings. So, despite the fact that it is no longer a criminal offence to divulge confidential information it is likely that the use of section 4 will still be the most used provision of the new law.

CIDL continues to set out a complete ban on disclosing confidential information except in certain circumstances. In this regard the CIDL reflects the CRPL in that a person will not fall foul of the law on disclosing confidential information in the following circumstances:

1. in compliance with directions of the Court pursuant to application for approval under section 4;
2. in the normal course of business with the consent of the principal;
3. in compliance with an order made by the Court in relation to criminal proceedings, mutual legal assistance or the gathering of evidence by other jurisdictions;

4. directions made by the Cayman Islands Monetary Authority, the Financial Reporting Authority and the Anti-Corruption Commission; and,
5. in accordance with, or pursuant to, a right or duty created by any other law or regulation.

However, one key distinction is that whereas the CRPL exceptions applied generally, the new CIDL exceptions apply only where a person owes a duty of confidence, again, placing the ambit of enforcement squarely in the hands of the civil courts. The duty of confidence is an area of common law which is developing rapidly in England & Wales, and we may expect similar movement in the Cayman Islands.



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